United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

Signed

75-4248

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ESTATE OF AMY ANN McGINNIS SPALDING,
Deceased, CHARLES F. SPALDING,
Executor,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

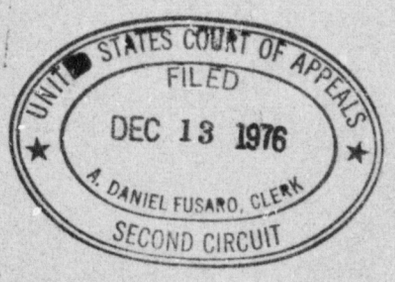
Appellee

ON APPEAL FROM THE DECISION OF THE

UNITED STATES TAX COURT

APPELLEE'S PETITION FOR REHEARING AND FOR

RECALL AND REFORMATION OF MANDATE



MYRON C. BAUM,
Acting Assistant Attorney General,

GILBERT E. ANDREWS,
MICHAEL L. PAUP,
WILLIAM S. ESTABROOK III,
Attorneys,
Tax Division,
Department of Justice,
Washington, D.C. 20530.

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-4248

ESTATE OF AMY ANN McGINNIS SPALDING, Deceased,
CHARLES F. SPALDING, Executor,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

ON APPEAL FROM THE DECISION OF THE

UNITED STATES TAX COURT

APPELLEE'S PETITION FOR REHEARING AND FOR RECALL AND REFORMATION OF MANDATE

To the Honorable United States Court of Appeals for the Second Circuit:

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the Commissioner of Internal Revenue, the appellee herein, respectfully petitions a second time for rehearing, and in support of that petition states as follows:

On June 18, 1976, this Court (Judges Moore, Feinberg and Wyzansky) entered an opinion (officially reported at 537 F. 2d 666) holding that Charles Spalding was the "surviving spouse" of the decedent, Amy Ann McGinnis Spalding, within the meaning

of Section 2056 of the Internal Revenue Code of 1954 and that the amounts Amy had left Charles qualified for the marital deduction provided for in that section of the Code. It thus held that even though Charles' first wife, Elizabeth, had obtained an order from the New York courts holding that Charles' Nevada divorce from her was invalid and that Charles and Elizabeth remained married, the California marriage ceremony celebrated by Charles and Amy was effective to render Charles Amy's "spouse" for purposes of the Federal estate tax. This Court expressed its "unwillingness on this record to assume the responsibility for declaring that Charles and Amy were not husband and wife in California" (537 F. 2d p. 669) since the only documentary evidence concerning the marital status of the parties consisted of Charles' 1964 Nevada divorce from Elizabeth, the 1967 declaratory judgment Elizabeth had obtained in the New York courts and Charles' 1968 "marriage" to Amy in 1968. In so ruling, this Court emphasized "that California, the state of both the matrimony and the administration of the estate, had taken no action to invalidate the marriage of its citizens or to annul the marriage certificate issued in California" (537 F. 2d, p. 669). It further noted that "If the views of the Commissioner are accepted, by the signature of a judge of a court of original jurisdiction to a decree in New York, Charles will remain shackled to Elizabeth for the rest of his life and California would be powerless to view it otherwise." (Id.)

As the attached affidavit of William S. Estabrook III shows, after entry of this Court's opinion and after denial of the petition for rehearing we subsequently filed, the Government learned for the first time of certain highly significant facts, facts which relate directly to the core of this Court's opinion--the status of Charles and Amy's marriage under California law. These newly-discovered facts, we respectfully submit, warrant a granting of this petition for rehearing, a recall of the mandate of this Court, and an affirmance of the Tax Court's decision in this case in favor of the Commissioner.

We have learned, despite the silence of the appellant and his counsel on the matter, that the courts of the State of California were, in fact, asked by Charles Spalding to dissolve his marriage to Elizabeth after Amy's death, and that the courts of the State of California did in fact grant Charles a divorce. Indeed, Charles was engaged in these divorce proceedings at the very time he filed the estate tax declaration at issue in these proceedings claiming he was validly married to Amy. Thus, while Charles had, on April 16, 1971, filed an estate tax return in which he swore that he was the "surviving husband" of Amy (Ex. 2-B, p. 3), he had earlier sworn in a petition signed under oath and filed in the California proceedings on September 15, 1970, that he and Elizabeth were married and that he sought a dissolution of that marriage, pursuant to California law. (Appendix A, infra., p. 9.) And, whereas Charles had

testified under oath on June 11, 1971, in the California proceedings that "there are irreconcilable differences which have arisen between * * * [Charles and Elizabeth] which have led to the incurable breakdown of your marriage" (Appendix A, infra, p. 78), in a verified petition in the Tax Court proceedings, he later swore that he was married to Amy on December 18, 1969, when she died. (Pet. 3.)[1/] Charles was granted a final decree of divorce from Elizabeth by the California divorce court, effective August 10, 1971.[2/]

Nor, we have discovered, was this the only legal action in Amy's domiciliary state concerning Charles' marital status. We have further learned that shortly after Charles and Amy participated in their "wedding" ceremony, Elizabeth brought an action in the California courts seeking, inter alia, a declaration that she, and not Amy, was Charles wife. Although it was dismissed as moot after Amy's death, this action was

1/ James B. Lewis, one of counsel for the appellant in this case, has advised this office that he was aware of the California proceedings described above.

2/ Elizabeth had instituted proceedings in the courts of the State of Connecticut seeking to enjoin Charles from prosecuting the California divorce action and further seeking a divorce from Charles pursuant to Connecticut law. While this suit was pending, the California divorce court granted Charles a divorce decree. Elizabeth then amended her complaint to seek a declaratory judgment that the California divorce decree was invalid. The Connecticut courts rejected that latter claim. We have attached copies of the state referee's and the Connecticut Supreme Court's opinions as Appendix B, infra.

actually pending at the time of Amy's death.[3/] No. 594884, Superior Court for San Francisco County.

The assumption underlying Section 2056 of the Internal Revenue Code, as evidenced most recently by this Court's opinions in the present case, and in Estate of Goldwater v. Commissioner, 539 F. 2d 878, petition for certiorari pending, October Term, 1976, No. 76-438, is that the decedent and the recipient must be validly married before bequests from one to the other will qualify for the marital deduction provided for in that section. In our view, it was deceptive of the appellant in this case to fail to advise the Tax Court or this Court that he had obtained a California divorce from his first wife, Elizabeth, after the death of his second "wife", Amy. This deception became all the more significant when this Court announced its opinion in the matter, stressing how important it was that there had been no California proceeding addressing itself to the validity of Charles' second marriage. Nor can the appellant attempt to excuse his conduct by urging that the California proceeding addressed itself to the status of Charles' marriage to Elizabeth, and not to Charles' marital status vis-a-vis Amy. By invoking the jurisdiction of the California courts to grant him a divorce from Elizabeth (see Cal. Civil Code, Section 4502, West's Ann. Civil Codes.), he acknowledged the legal

3/ We might note that the estate took considerable liberties in describing the situation here as one in which the "marriage stands unchallenged in the [jurisdiction] * * * in which it was contracted and in which the decedent was domiciled at death." (Reply Br., p. 10.)

impossibility of his marriage to Amy having been valid. There could have been no valid marriage between Charles and Amy until Charles had first obtained a legal and binding divorce from his wife Elizabeth. Charles is certainly in no position to dispute this fact, for his actions in the California proceeding described above speak for themselves: in preparation for his marriage to Bernice R. Grant on August 10, 1971 (see Spalding v. Spalding, 37 Conn. L. J. No. 52, June 22, 1976, p. 4, Appendix B, infra, p. 91) he brought suit to dissolve his marriage with Elizabeth, and only after the divorce granted in that suit became final did he marry Bernice.[4/] In short, the predicate to a valid marriage to Amy was a valid divorce from Elizabeth. Charles Spalding has, by his contradictory averments in this case and in the 1971 California proceeding, confessed that his marriage to Elizabeth was valid and subsisting at the time of Amy's death. See Section 4401, Cal. Civil Code, West's Ann. Civil Codes. His failure to acknowledge this duplicitous conduct in the proceedings below, or in this Court on appeal, vitally affects the "integrity of the judicial process" and fully warrants a rehearing and a recall and reformation of the mandate of this Court. (Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238, 246 (1944). And see Universal Oil Prod. Co. v.

4/ Charles was granted an interlocutory decree of divorce on June 11, 1971, a final judgment of divorce on August 17, 1971, which latter judgment was later ordered, September 20, 1976, effective nunc pro tunc as of August 10, 1971. (Appendix A, infra, pp. 72, 82-83.)

Root Refining Co., 328 U.S. 575 (1946); cf. Kenner v. Commissioner, 387 F. 2d 689, 691 (C.A. 7, 1968); Toscano v. Commissioner, 441 F. 2d 930 (C.A. 9, 1971).

Respectfully submitted,
Myron C. Baum
MYRON C. BAUM,
Acting Assistant Attorney General,

GILBERT E. ANDREWS,
MICHAEL L. PAUP,
WILLIAM S. ESTABROOK,
Attorneys,
Tax Division,
Department of Justice,
Washington, D.C. 20530.

DECEMBER, 1976.

CERTIFICATE OF COUNSEL

The undersigned counsel for the appellee hereby certifies that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

Myron C. Baum

MYRON C. BAUM
Acting Assistant Attorney General

CERTIFICATE OF SERVICE

It is hereby certified that service of this petition for rehearing and for recall and reformation of mandate has been made on opposing counsel by mailing two reproduced copies thereof on this 9th day of December, 1976, in an envelope, with postage prepaid, properly addressed to them as follows:

James B. Lewis, Esquire
Jose E. Trias, Esquire
Paul, Weiss, Rifkind, Wharton
& Garrison
345 Park Avenue
New York, New York 10022

Gilbert E. Andrews

GILBERT E. ANDREWS,
Attorney.

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APPENDIX A

Name, Address and Telephone Number of Attorney(s)

COOPER, WHITE & COOPER
44 Montgomery Street
San Francisco, California 94104
Telephone: 433-1900

Attorney(s) for Petitioner

Space Below for Use of Court Clerk Only

FILED

SEP 15 1970

MARVIN CHURCH, County Clerk

By [illegible] Deputy

INDEXED

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

In re the marriage of

Petitioner: CHARLES F. SPALDING

and

Respondent: ELIZABETH C. SPALDING

CASE NUMBER

155616

PETITION (MARRIAGE)

1. This petition is for:

☐ Legal separation of the parties pursuant to:
- ☐ Civil Code Section 4506(1)
- ☐ Civil Code Section 4506(2)

☐ Dissolution of the marriage pursuant to:
- ☒ Civil Code Section 4506(1)
- ☐ Civil Code Section 4506(2)

Petitioner has been a resident of this state for at least six months and of this county for at least three months immediately preceding the filing of this petition.

(Petitioner / Respondent)

☐ Nullity of the marriage pursuant to:
- ☐ Civil Code Section 4400
- ☐ Civil Code Section 4401
- ☐ Civil Code Section 4425( )

2. Relevant statistical information for the purpose of this proceeding is:

a. The parties were married on May 4, 1945 (Date) in Pennsylvania (Name of state or foreign country)

b. The date of separation is October 1961. The number of years from date of marriage to date of separation is: 16 years, 4 months, 27 days.

c. There are 6 (Number) children of this marriage including the following minor children:

Name	Birthdate	Age	Sex
Charles F. Spalding, Jr.	September 11, 1946	24	Male
Gerald C. Spalding	September 10, 1947	23	Male
Richard C. Spalding	December 16, 1950	19	Male
Elizabeth W. Spalding	June 11, 1953	17	Female
Josephine L. Spalding	June 11, 1953	17	Female
Florence C. Spalding	November 22, 1959	11	Female

d. Husband's social security number is 552 - 38 - 9779. Wife's social security number is unknown

Form Adopted by Rule 1281 of Judicial Council of California Effective January 1, 1970

PETITION (MARRIAGE)

3. The property subject to disposition by the court in this proceeding is:

a. [X] None

b. [ ] Divided by agreement, which ..... (is / is not) attached hereto

c. [ ] Stated below (or attached):

1.
2.
3.
4.
5.
6.
7.
8.

4. Petitioner requests that:

a. [ ] Custody of children be awarded to As awarded in prior proceeding (Petitioner / Respondent / other [specify])

b. [ ] Support of children be awarded if need is found

c. [ ] Spousal support ..... (not) be awarded ..... (Petitioner / Respondent) if need is found

d. [ ] Property rights be determined as provided by law

e. [ ] Attorneys' fees and costs ..... (not) be awarded ..... (Petitioner / Respondent) if need is found

and that the court inquire into the status of the marriage and render such judgments and make such injunctive or other orders as are appropriate.

5. A copy of the proposed judgment is not (is / is not) filed herewith.

* I declare under penalty of perjury that the foregoing, including any attachments, is true and correct.

Executed on September 14, 1970 (Date) at Hillsborough (Place), California.

COOPER, WHITE & COOPER
Attorney(s) for Petitioner

Charles J. Spalding, Petitioner

* A declaration under penalty of perjury must be executed within California. If document is executed outside California, attach an affidavit.

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CALENDAR

LAWSON, JORDAN, WALSH & LAWRENCE
1249 Russ Building
San Francisco, California 94104
Telephone: 392-4142

Attorneys for Respondent

FILED
NOV 6 - 1970
WILLIAM CHURCH, County Clerk
By [illegible] Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

In re the marriage of

CHARLES F. SPALDING,

Petitioner,

and

ELIZABETH C. SPALDING,

Respondent.

No. 155616

MOTION TO DISMISS OR STAY ACTION; DECLARATION OF MICHAEL P. CARBONE; AND MEMORANDUM OF POINTS AND AUTHORITIES

TO CHARLES F. SPALDING, PETITIONER, AND TO COOPER, WHITE & COOPER, HIS ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on November 24, 1970, at 9:30 o'clock a.m. in the Department of the Presiding Judge of the above-entitled Court respondent ELIZABETH C. SPALDING, appearing specially, will move the Court for an order to dismiss or stay this action on the ground of inconvenient forum.

The motion will be based on this notice, the declaration of Michael P. Carbone and the memorandum of points and authorities submitted herewith, the temporary injunction issued by the Superior Court of the State of Connecticut on October 29, 1970 and respondent's application for said injunction, a copy of which is attached hereto marked Exhibit "A" and a certified copy of which will be offered at the time of the

////

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LAWSON, JORDAN,
WALSH & LAWRENCE
RUSS BUILDING

hearing, and such evidence as may be produced at the time of the hearing.

Dated: November 5, 1970.

LAMSON, JORDAN, WALSH & LAWRENCE

By Michael P. Carbone
Michael P. Carbone
Attorneys for Respondent

DECLARATION OF MICHAEL P. CARBONE

I, the undersigned, declare under penalty of perjury that the following is true and correct:

I am an attorney at law licensed in the State of California and an associate with the firm of LAMSON, JORDAN, WALSH & LAWRENCE, attorneys for respondent herein.

On October 28, 1970, respondent filed a civil action against petitioner in the Superior Court of the State of Connecticut in which she requested the following relief: a divorce, custody of the parties' minor children, temporary and permanent support of all minor children, temporary and permanent alimony, counsel fees, and a temporary injunction restraining petitioner herein from prosecuting this action until the action filed in the State of Connecticut shall have been heard or until further order of that Court. On October 29, 1970, the Court granted the temporary injunction prayed for, and on October 30, 1970, petitioner herein was personally served in the State of Connecticut with a copy of said injunction

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WALSH & LAWRENCE
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SAN FRANCISCO
PHONE 392-4142
SAN [illegible]
SHEET 21

and respondent's pleading in said Connecticut action.

Executed this 5th day of November, 1970, in San Francisco, California.

Michael P. Carbone

MEMORANDUM OF POINTS AND AUTHORITIES

I.

THE COURT MAY DISMISS OR STAY THIS ACTION ON THE GROUND OF INCONVENIENT FORUM

Code of Civil Procedure § 418.10 provides in pertinent part:

> "(a) A defendant, on or before the last day of his time to plead or within such further time as the court may for good cause allow, may serve and file a notice of motion either or both:
>
> "(1) To quash service of summons on the ground of lack of jurisdiction of the court over him.
>
> "(2) To stay or dismiss the action on the ground of inconvenient forum."

Rule 1206 of the California Rules of Court provides that the provisions of the general laws applicable to civil actions apply to proceedings pursuant to the Family Law Act except where they would be inconsistent with the Family Law Rules. Accordingly, the foregoing statute applies in this proceeding.

[illegible]

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PHONE 392-4143

II

THIS COURT SHOULD NOT ALLOW PETITIONER TO DISOBEY THE CONNECTICUT INJUNCTION

Ever since the noted case of Sharon v. Sharon (1890) 84 Cal. 424, it has been established that California courts should respect anti-suit injunctions issued by courts of other jurisdictions. In the Sharon case a United States Circuit Court had determined that no valid marriage existed between the parties and had enjoined the plaintiff from asserting any marital or property rights against the defendant in further litigation. The Supreme Court of California held that the Superior Court should have required plaintiff to obey the injunction. It quoted from Engels v. Lubeck, 4 Cal. 32: "The comity which one court owes to another of concurrent jurisdiction should always prevent the one from lending itself as an instrument in permitting a contempt of the process of the other."

Courts of other jurisdictions are in harmony with the view that comity requires respect be given to foreign injunctions of this type. Aller v. Chicago Great Western Railroad Co., 289 Ill. App. 38; Odom v. Langston, DCWD Mo., 75 F.Supp.651; Fisher v. Pacific Mutual Life Insurance Co., 112 Miss. 30, 72 So. 846; Equitable Life Assurance Soc. of United States v. Gex' Estate; 184 Miss. 577, 186 So. 659. The State of Connecticut from which this injunction issues is among them. See Corbin v. Corbin, 26 Conn. Super. 443, 226 A.2d 799 (1967) in which Connecticut respected a West Virginia injunction against maintenance of a divorce suit in Connecticut.

In respecting such injunctions, courts have often cited the reason that the foreign court was the first to acquire jurisdiction. Taylor v. Atchison, T. & S.F.R.Co. (1937) 292 Ill. App. 457, 11 N.E.2d 610, cert. den. 304 U.S. 560, 82 L. Ed. 1528, 58 S. Ct. 942; Nichols & Shepard Co. v. Wheeler (1912)

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150 Ky. 169, 150 S.W. 33; Alford v. Wabash R. Co. (1934) 229 Mo. App. 102, 73 S.W.2d 277.

In the present case the Superior Court of Connecticut was the first court to acquire jurisdiction of these parties and their marriage when respondent commenced an equitable support action against petitioner in June 1967, resulting in a stipulated judgment which is presently in effect and which provides for respondent's support.

III

CALIFORNIA IS NOT A CONVENIENT FORUM FOR THIS ACTION

The Superior Court of the State of Connecticut has obviously determined that California is not a convenient forum. There are sound reasons for that determination. If the Court were to proceed with this action and decree dissolution of this marriage, respondent's support rights would be seriously prejudiced. Under Connecticut law the existing support order depends for its existence on the continuation of the marriage. As evidence of such law respondent requests this Court to take judicial notice of the following cases: Smith v. Smith, 150 Conn. 15, 183 A.2d 848; Smith v. Smith, 151 Conn. 292, 197 A.2d 65; Yates v. Yates, 155 Conn. 544, 235 A.2d 656; Nowell v. Nowell, 157 Conn. 470. Accordingly, the effect of a California dissolution of the marriage would be to terminate the Connecticut support order by operation of law.

Because of this rule of Connecticut law, the only way for respondent's right of spousal support to be preserved following this action would be through entry of a California support decree. Respondent submits that this method of procedure would be unjust, would entangle the parties in needless problems of conflicts of laws, and would engender more litigation

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in the future. It would mean that the courts of three States, Connecticut, New York, and California would each have given orders on some aspect of the Spalding family situation. In order to enforce the California support decree, respondent would have to travel from her home state or else commence proceedings there to enforce the foreign decree. Because foreign decrees for payment of spousal support in installments are not entitled to full faith and credit except as to past due installments (Barber v. Barber, 323 U.S. 77 (1944); Sistare v. Sistare, 218 U.S. 1(1910)), respondent would be compelled to bring a separate action each time petitioner became delinquent. Moreover, in the event of a request by either party for modification of the support award, respondent would be required to litigate the question of modification in California. We have found no indication that Connecticut would undertake to modify a foreign support decree as California courts do under the authority of Worthley v. Worthley, 44 Cal.2d 465 (1955).

For these reasons, maintenance of this California action would cause grave inconvenience to respondent in the future.

CONCLUSION

Petitioner should not be allowed to disobey the injunction of the Superior Court of the State of Connecticut - the Court which first acquired jurisdiction of the parties and their marriage. If a divorce is to occur, then respondent should be given the opportunity to obtain it in the State of Connecticut where all of the rights of the parties can be settled in one decree.

Respondent submits that the Court should dismiss this

until the Connecticut divorce action has been finally adjudicated, whereupon this action should be dismissed.

Dated: November 5, 1970.

Respectfully submitted,

LAMSON, JORDAN, WALSH & LAWRENCE

By Michael P. Carbone

Michael P. Carbone
Attorneys for Respondent

LAW OFFICES OF
LAMSON, JORDAN,
WALSH & LAWRENCE
RUSS BUILDING
SAN FRANCISCO
PHONE 392-4142

TO THE SHERIFF OF THE COUNTY OF FAIRFIELD, OR HIS DEPUTY, WITHIN SAID COUNTY:

G R E E T I N G S:

BY AUTHORITY OF THE STATE OF CONNECTICUT, You are hereby commanded to summon CHARLES F. SPALDING, of 1832 Floribunda, Hillsborough, California, to appear before the SUPERIOR COURT in and for the County of Fairfield, at STAMFORD, on the THIRD TUESDAY OF NOVEMBER, 1970, at 10 o'clock in the forenoon, then and there to answer unto ELIZABETH C. SPALDING, of Hill Road, Greenwich, Connecticut, in a civil action wherein the plaintiff complains and says:

FIRST COUNT:

1. The plaintiff, whose maiden name was Elizabeth Coxe, and the defendant intermarried May 4, 1945, at Haverford, in the State of Pennsylvania.

2. The plaintiff has resided continuously in this State for more than one year next preceding the date of this complaint.

3. The defendant on divers days between January 1, 1962, and the date of this writ has been guilty of intolerable cruelty to the plaintiff.

4. On divers days between January 1, 1960, and the date hereof the defendant has committed adultery with various Jane Does.

5. On November 15, 1962, the defendant willfully deserted the plaintiff and has continued said desertion with total neglect of all the duties of the marriage covenant on his part to be

performed to the date of this writ being for more than three years.

6. The plaintiff and the defendant have four minor children, issue of their marriage; Richard C. Spalding, born December 16, 1950; Elizabeth W. Spalding and Josephine L. Spalding, born June 11, 1953; Florence C. Spalding born November 22, 1959.

7. The defendant owns real and personal estate in excess of $4,500,000.00 in value.

8. The plaintiff resides at Hill Road, Greenwich, Connecticut, the defendant resides at 1832 Floribunda, Hillsborough, California.

SECOND COUNT:

1. The plaintiff has resided in Connecticut to the date hereof since 1947 and the defendant was a resident of this State until he deserted the plaintiff in November of 1962.

2. Subsequent to the defendant's desertion, he went to the State of Nevada for the sole purpose of establishing residency in an attempt to obtain a divorce from the plaintiff.

3. The defendant commenced a divorce action in which the plaintiff did not appear and obtained an invalid decree of divorce on or about March 19, 1964 in the Second Judicial Court in the County of Washoe, State of Nevada.

4. Said Nevada decree was invalidated, set aside and declared null and void by the Supreme Court, State of New York on March 13, 1968 in an action Elizabeth C. Spalding v. Charles F. Spalding docket no. 1477/67 .

5. The Supreme Court of the State of New York further declared that Elizabeth C. Spalding was at all times the lawful

wife of Charles F. Spalding and the defendant took no appeal from said Judgment.

6. After obtaining the invalid decree of divorce the defendant returned to the State of New York.

7. The defendant with the knowledge that the New York Supreme Court had set aside said Nevada decree of divorce, thereupon entered into a bigamous marriage with Amy Ann McGinnis Sullivan knowing at said time that he was married to the petitioner.

8. Said Amy Ann McGinnis Sullivan died on or about December 16, 1969.

9. By Writ, Summons and Complaint dated April 28, 1967, the plaintiff commenced an equitable support action arising out of the marital relationship against the defendant returnable the First Tuesday of June, 1967, Superior Court, Fairfield County, at Stamford in the case captioned Elizabeth C. Spalding v. Charles F. Spalding, docket no. 10981 and a stipulated judgment was entered by the Court which is presently in effect whereby the defendant was required to pay the plaintiff for her support the amount of $1,600.00 per month.

10. On November 4, 1966 the New York Supreme Court, County of New York entered an order in reference to child support and custody in docket # 9952/1966 which order was modified on March 28, 1969, and affirmed by the appellate Division, First Department State of New York which provided in part: that Elizabeth Spalding was awarded custody of Elizabeth W. Spalding, Josephine L. Spalding and Florence C. Spalding and $200.00 per month child support for each child; Charles F. Spalding was to pay educational expenses of said children, past due and future real estate taxes on the house in Greenwich, past due and future interest on the loan of said house in Greenwich, and necessary repairs to said house

11. On or about September 15, 1970, the defendant instituted a petition for dissolution of the marriage pursuant to the California Civil Code Section 4506 (1) in the Superior Court, of the State of California, County of San Mateo, docket no. 155616.

12. The plaintiff has not been personally served, nor has appeared in said California action.

13. The petitioner's purpose of moving to California was to attempt to establish residency so to obtain jurisdiction in the State of California, which has no grounds of fault in order to obtain a divorce or dissolution of marriage decree.

14. The purpose of the defendant's petition in California is to obtain a termination of the marriage in his favor which he could not obtain in Connecticut, and to terminate the plaintiff's support rights and child support award.

15. The plaintiff has in the past expended substantial sums of money for counsel fees to defend litigation commenced by the defendant.

16. The defense of the California action will cause the plaintiff unnecessary cost and expense.

17. The defendant should not be allowed to proceed with the California action until such time as there is a full adjudication on the merits of this cause.

18. The plaintiff will suffer irreparable harm for which she has no adequate remedy at law.

THE PLAINTIFF CLAIMS:

1. A divorce.

2. Custody of the parties minor children.

3. Temporary and permanent support of all minor children.

4. Temporary and permanent alimony.

5. Counsel fees to prosecute this action, including counsel fees pendente lite.

6. A temporary injunction restraining the defendant, Charles F. Spalding from directly, or indirectly, personally or by his agent or attorney from prosecuting, pursuing, proceeding, or in any manner whatsoever, from taking action in or with regard to a certain petition commenced in the State of California, entitled Charles F. Spalding v. Elizabeth C. Spalding, docket no. 155616 in the Superior Court of the State of California, for the County of San Mateo or in any other jurisdiction of the State of California or any other state, until the above-entitled cause as captioned above shall have been heard or until further order of this Court.

7. Such other and further relief as may be just.

AARON B. SCHLESS of Bridgeport, Connecticut is recognized in $75.00 to prosecute, etc.

Of this writ, with your doings thereon, due service and return make.

Dated at Stamford, Connecticut, this 28th day of October, 1970.

s/ Richard A. Silver
RICHARD A. SILVER
Commissioner of the Superior Court

Please enter the appearance of
Richard A. Silver
1100 Bedford Street
Stamford, Connecticut
for the plaintiff.

STATE OF CONNECTICUT
ss: Stamford, Conn. October 23, 1970
COUNTY OF FAIRFIELD

I, Elizabeth C. Spalding, the plaintiff and petitioner in the foregoing application hereby acknowledge that I have read the foregoing application for temporary injunction and the allegations contained therein are true.

Elizabeth C. Spalding
ELIZABETH C. SPALDING

Subscribed and sworn to this 23rd day of October, 1970, before me.

Commissioner of the Superior Court

Ret. 3rdTues. November, 1970

ELIZABETH C. SPALDING — SUPERIOR COURT

VS. — FAIRFIELD COUNTY at Stamford

CHARLES F. SPALDING — OCTOBER 28, 1970

O R D E R

The above-entitled application for temporary injunction having been presented and it appearing that a temporary injunction of the form and manner aforesaid should be entered,

NOW THEREFORE, IT IS ORDERED,

That this Court finds that said injunction should be issued and that no bond or other security should be required from the plaintiff, and

That the defendant, Charles F. Spalding, be and he hereby is, forbidden by this Court either directly, or indirectly, personally or by his agent or attorney from prosecuting, pursuing, proceeding, or in any manner whatsoever, from taking action in or with regard to a certain petition commenced in the State of California, entitled Charles F. Spalding v. Elizabeth C. Spalding, docket no. 155016 in the Superior Court of the State of California, for the County of San Mateo or in any other jurisdiction of the State of California or any other state, until the above-entitled cause as captioned above shall have been heard or until further order of this Court.

Dated at Stamford, Connecticut this 29th day of October, 1970.

s/ Otto H. LaMacchia

A Judge of the Superior Court

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

In re the Marriage of

CHARLES F. SPALDING,

Petitioner,

and

ELIZABETH C. SPALDING,

Respondent.

NO. 155614

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS OR STAY ACTION

I

RESPONDENT CANNOT ENJOIN PETITIONER, A CALIFORNIA RESIDENT, FROM PROCEEDING WITH HIS DISSOLUTION ACTION IN CALIFORNIA

The pleadings, motions, affidavits and other documents previously filed in this matter adequately demonstrate that petitioner, CHARLES F. SPALDING, a California resident, commenced a dissolution proceeding against respondent in this Court on or about September 15, 1970, and subsequently effected personal service of all appropriate dissolution papers on respondent at her Greenwich, Connecticut home. Respondent, ELIZABETH C. SPALDING, has now served petitioner with a temporary injunction issued by the Superior Court of Fairfield County, Connecticut, which injunction purportedly restrains petitioner from proceeding

with this dissolution proceeding pending resolution of a divorce action filed by respondent in Connecticut subsequent to commencement of this action. It is respondent's position, as manifested in her Memorandum of Points and Authorities in support of her Motion to Dismiss or Stay this Action, that this Court should respect such Connecticut temporary injunction as a matter of comity, and stay the proceeding at bar until respondent's Connecticut action has been adjudicated.

Attached hereto as Exhibit "A" is a formal Declaration signed by petitioner setting forth in detail the proof of his California residence. Attached as Exhibit "B" is a Declaration by petitioner describing the numerous legal proceedings initiated against petitioner by respondent in three states over the period of the last six years and detailing the substantial amounts of support he has furnished over the past eight years. It is petitioner's belief, as described in greater detail and length therein, that respondent's sole purpose in commencing such myriad legal proceedings was and is to harass, aggravate, and punish petitioner, and not to serve any useful or beneficial purpose to either of the parties herein or to their children. Because of the desirability to all parties concerned that the uncertain marital status of petitioner and respondent be settled once and for all, petitioner initiated this dissolution proceeding in this Court, in the state of his residence.

Respondent has cited, in support of her argument that California should recognize the Connecticut temporary injunction, a number of miscellaneous decisions representing the general rule that comity requires that respect be given to foreign injunctions "of this type", and that the comity which courts of concurrent jurisdiction owe to each other should prevent one such court from lending itself as an instrument

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in the perpetration of a contempt of the process of the other. With specific reference to the type of domestic relations proceedings involved herein, petitioner would further elaborate upon and confirm the general accuracy of respondent's legal argument by demonstrating that several courts have successfully claimed jurisdiction to enjoin the institution or continuance of a foreign domestic proceeding where both parties to the proceeding were residents of the state where the injunction was granted. See Murtagh v. Murtagh, 10 Chest. 591 [Pa. Com. Pl. 1962]; Pines v. Pines, 48 Misc. 2d 420, 265 N.Y.S. 2d 9, Annotation, "Injunction - Foreign Divorce Action", 54 A.L.R. 2d 1240, 1250. However, where the spouse suing for divorce in a foreign jurisdiction is not a "runaway spouse" but has established bona fide residence in such foreign jurisdiction, no injunction prohibiting such divorce action should issue from the state of residence of the other spouse.

It has been frequently held that no injunctive relief should be granted against a defendant spouse who has acquired a bona fide domicile and residence in the jurisdiction in which he initiated or commenced a divorce action. Kleinschmidt v. Kleinschmidt, 343 Ill. App. 539, 99 N.E. 2d 623 (1951); Stultz v. Stultz, 15 N.J. 315, 104 A. 2d 656 (1954); Faulk v. Faulk, 21 App. Div. 2d 967, 252 N.Y.S. 2d 689; Dominick v. Dominick, 26 Misc. 2d 344, 205 N.Y.S. 2d [illegible]; Rosenstiel v. Rosenstiel, 32 Misc. 2d 542, 225 N.Y.S. [illegible]05. See also Wehrkane v. Peyton, 58 A. 2d 698, 134 Conn. 486, 6 A.L.R. 2d 887; Foris v. Foris, 103 N.J. supra 316, 247 A. 2d 156. The theoretical and logical reason for this general rule is that equity has no power to restrain a person from obtaining a lawful divorce. See Smith v. Smith, 364 Pa. 1, 70 A. 2d 630 (1950); 54 A.L.R. 2d 1250, 1251. A spouse's right to have his marital status adjudicated in the courts of his

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present domicile cannot be taken away in a proceeding in personam in another state. Kleinschmidt v. Kleinschmidt, supra; Walker v. Walker, 84 Nev. 118, 437 P. 2d 91 (1968).

Connecticut has held that it can, in its discretion, recognize a foreign injunction restraining a party from appearing in a Connecticut divorce action as a matter of comity, but that it is not compelled to observe such a decree and that the court whose power is first invoked in the divorce action is the one in which the cause should be adjudicated. Cunningham v. Cunningham, 25 Conn. Sup. 221, 200 A. 2d 734 (1964); See also Nowell v. Nowell, 157 Conn. 470, 254 A. 2d 889 (1969). It has also held that it must recognize a foreign divorce judgment under the mandate of full faith and credit despite the fact that the judgment was obtained in defiance of a Connecticut antisuit injunction. Nowell v. Nowell, supra, p. 894. California, in the present circumstances, is under no obligation to recognize the Connecticut injunction, and even by Connecticut standards it should not do so where it has first assumed jurisdiction of the dissolution action and the petitioner is a bona fide California resident.

Similarly, the Nevada Supreme Court recently held in Walker v. Walker, supra, that a preliminary injunction against the further prosecution of the wife's previously instituted California divorce action for determination of property and alimony questions should not have been granted by the Nevada trial court.

The Nevada Supreme Court stated therein:

> "...our concern is with the propriety of a preliminary injunction against the further prosecution of an extra state lawsuit involving the same parties and issues. In Brunzell Construction Co., Inc. v. Harrah's Club, 81 Nev. 414, 404 P. 2d 902 (1965), we ruled that considerations such as local Nevada conditions, convenience to the Nevada

> plaintiff and his desire to litigate in Nevada rather than elswhere, were not persuasive considerations, and we approved the notion that the power to restrain the parties from proceeding in another jurisdiction is to be sparingly and reluctantly exercised. By reason of Brunzell, it is clear that our policy is to avoid where possible the restraint of a prior action pending in another state. A clear showing must be made that restraint is necessary to prevent manifest wrong or injustice.
>
> "The controversy over the validity of Shirley's residence in California does not suggest that Nevada should entertain the litigation and preclude California from further action. Indeed, the question whether Sherley has established a residence, sufficient in nature and duration to meet the requirements of California, is peculiarly one of California law. If in fact the California court lacks jurisdiction, then we must assume that the California court will correctly decide this point of California law. In the event California rules that Shirley's docicile is in that state, it is appropriate that the California court should also determine her right to support."
> [Citations]

Exhibit "A" attached hereto amply demonstrates that petitioner satisfies all requirements of California residence, and that he intends to maintain California as his permanent residence. Respondent's Connecticut pleadings, attached as Exhibit "A" to respondent's motion herein, admit and state conclusively that petitioner's residence is 1832 Floribunda Avenue, Hillsborough, California. On the basis of such evidence, the parties hereto have provided sufficient data for California courts to determine as a matter of law that petitioner is a California resident.

In the instant action, petitioner should be allowed to proceed with his dissolution proceeding in the state of his residence, without interruption or interference by a foreign court. Petitioner is not and has not been a

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Connecticut resident for in excess of eight years, and the only alleged basis for Connecticut's jurisdiction over petitioner is the fact that petitioner was served with the subject injunction while on a brief recent visit to the state to visit his children. As frequently stated, an order restraining a defendant pendente lite from instituting or continuing with a foreign action does not restrain the foreign court, but acts solely upon the defendant. Dominick v. Dominick, supra; Nowell v. Nowell, supra. Issuance of such a temporary injunction under the present circumstances constitutes an unwarranted interference with the orderly judicial processes of the other state. Bauer v. Bauer, 182 N.Y.S. 2d 59 (1958).

Respondent's Memorandum of Points and Authorities focuses generally upon the asserted obligation, or courtesy, of California to Connecticut to recognize Connecticut's injunction. As demonstrated above, Connecticut's injunction should not have been issued, and is not entitled to recognition by California in the instant situation involving a legal proceeding commenced by one of its own citizens. Rather than be forced to contest the validity or propriety of the Connecticut injunction in Connecticut, petitioner asserts that this Court, in the interest of protecting its own citizens, should deny respondent's motion to dismiss or stay these proceedings and permit this validly commenced dissolution action to proceed to conclusion.

II

THE CONVENIENCE OF CALIFORNIA AS A FORUM IS NOT IN QUESTION

The Restatement of Conflicts, Section 450, Comment "b", states, in pertinent part, as follows:

> "... An injunction rendered on grounds other than those going to the merits of the controversy, as, for example, an injunction

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> against suit in another state on grounds of convenience, is merely local in its effect and such an injunction will not prevent the person enjoined from exercising the right in question in another state. Neither will a temporary injunction nor an interlocutory order affect the exercise of a right in another state." [Emphasis added].

See generally, James v. Grand Trunk Western Railroad Company, 14 Ill. 2d 356, 152 N.E. 2d 858, cert. den. 358 U.S. 915.

Petitioner has every right to commence and proceed with an action for dissolution in the state of his residence; he could not, in fact, institute and obtain a legally binding and valid divorce decree in any other state but the state of his residence. Respondent's contention that, for her own alleged convenience, her subsequently instituted divorce action in Connecticut should take precedence over and therefore defeat petitioner's action in California, is ridiculous and would, if upheld, make a travesty of California's jurisdiction over and protection of its own citizens.

Respondent has argued that the Superior Court of Connecticut was the first court to acquire jurisdiction of these parties because of an equitable support action commenced by respondent against petitioner in June 1967. Respondent will surely contend this action provides such Connecticut court with continuing jurisdiction over both parties. Petitioner is confident that the Court will recognize the obvious and vital distinction between the 1967 equitable support action which necessarily limited itself to spousal support and completely avoided the question of the status of the parties, and her 1970 divorce action. In this new and different action, she seeks to litigate every aspect of her domestic relationship with respondent, including her status, support, custody and property rights. In no sense is the 1970 action a continuation of the 1967 action, and this Court must

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view respondent's Connecticut divorce action as subsequent and obviously in reaction to petitioner's dissolution proceeding.

Respondent states that her support rights would be seriously jeopardized were petitioner's dissolution proceeding to be successful, because under Connecticut law an existing support order depends for its existence on the continuance of the parties' marriage. Although the peculiarities of Connecticut law should have no effect on this Court's decision herein, respondent's problem is completely obviated by petitioner's announced intention under oath, as stated in Exhibit "B" attached hereto, to continue to make spousal support and child support payments to respondent in the amounts currently being paid.

Respondent further contends that the necessity for her enforcing a foreign support decree in California would entangle both parties in needless legal complications, not the least of which would be her obligation to bring a separate action in California each time petitioner became delinquent in making support payments. The specific problem raised by respondent is not before this Court and is for all practical purposes an unavoidable but always present concern in divorces involving spouses who live in separate jurisdictions. The necessity for bringing separate actions against petitioner would not be obviated were a final support decree rendered in Connecticut. Because of petitioner's California residence respondent would have to register a Connecticut decree for arrearages here in California and sue upon it in any event.

Under the circumstances, respondent's argument that California is not a convenient forum for determination of this action is groundless and would, if sustained, be prejudicial to petitioner's rights as a California citizen.

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III

THE EQUITIES LIE IN FAVOR OF PETITIONER

Petitioner and respondent separated in November 1962, because of what had became an obviously intolerable living situation for both parties. They had six minor children of their marriage. As set forth in greater detail in petitioner's Declaration attached hereto as Exhibit "B", petitioner thereafter attempted to dissolve his marriage to respondent by means of a Nevada divorce, the decree for which made generous provisions for respondent and each of the children. Immediately after rendition of the Nevada decree, respondent sought and eventually successfully obtained a declaration of nullity of such Nevada divorce by a New York court. Respondent, at the same approximate time that she sued for nullification of the Nevada divorce in the New York Court, brought her own suit for divorce in Connecticut, which suit she later withdrew. In the approximately eight years since their separation, respondent has initiated and vigorously prosecuted several legal actions against petitioner, none of which has indicated any desire to dissolve the parties' marriage, but each of which, in one form or another, has been directed to obtaining more financial support for respondent or the children in her custody.

The inconsistent and seemingly avaricious nature of the proceedings commenced by respondent, together with her vigorous prosecution thereof, have persuaded petitioner that respondent's principal motives in bringing her actions are harassment and punishment. Petitioner has dutifully complied with the orders of each of the various courts involved. He has, as set forth in Exhibit "B", expended well over $112,000 in supplying the complete financial support for his children's education, and he currently expends over $56,000 for alimony,

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child support, and other protection for his family. He has offered to continue the current support payments at the present amounts should this Court permit his action to proceed, in order to alleviate respondent's concern that her financial support will be terminated a s a matter of Connecticut law if the dissolution is granted. He agrees, in short, to grant respondent every financial consideration in order to terminate the unnecessary, unfortunate, prolonged uncertainty concerning his and respondent's marital status. Such an offer should carry great weight with the court, particularly in view of petitioner's unblemished record of meeting all his substantial support obligations to respondent and his children for over eight years.

It is petitioner's firm conviction that respondent's present motions and her numerous previous legal actions, were generated from little more than respondent's consuming desire to harass, humiliate, punish and impoverish petitioner. Petitioner believes that he should be allowed to terminate his marriage to respondent, and that the foregoing arguments and the declaration attached hereto, considered together with the unfortunate history of litigation between the parties, amply demonstrate the logic and fairness of his wishes.

CONCLUSION

On the basis of the foregoing arguments and exhibits, petitioner submits that respondent's present motions must be denied.

DATED: December 1, 1970.

COOPER, WHITE & COOPER

By R. Barry Churton
R. Barry Churton
Attorneys for Petitioner

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

In re the Marriage of CHARLES F. SPALDING, Petitioner, and ELIZABETH C. SPALDING, Respondent.	NO. 155 616 DECLARATION OF CHARLES F. SPALDING

I, CHARLES F. SPALDING, declare and say:

I am presently a California resident and I have resided in California since on or about July 1, 1969. I make this affidavit setting forth the factual bases for my legal residence in California in support of my opposition to respondent's motion on file herein.

I married the former Amy Ann McGinnis Sullivan, who resided at 1832 Floribunda, Hillsborough, California, in May 1968. For a period of months immediately following our marriage, my wife and I lived in New York City, where I worked as an investment banking counselor for Lazard Freres & Co. In July 1969, we assumed permanent residence at 1832 Floribunda, Hillsborough, and I continued my association with Lazard Freres & Co. in the same capacity, with special emphasis on exploring business opportunities and investment for the company in

EXHIBIT No. 4

California.

Our 1969 federal income tax return, which was filed jointly with my wife, lists my Hillsborough address as my permanent residence. Our 1969 California tax return, which was also a joint return and which also lists my Hillsborough address as my permanent residence, reflects payment of California income taxes on one-half of my salary for the year, constituting my salary and other income for the last six months of 1969 during which I resided in California.

My wife died on December 16, 1969. With the exception of frequent and necessary business trips to New York, I continued to live at 1832 Floribunda, Hillsborough, since that time.

I am a registered California voter, and I voted here in the recent November elections.

I possess a California driver's license, #E200650 and my 1969 Ford Station Wagon is registered with the California Department of Motor Vehicles.

I maintain a commercial account, No. 0589-17462, at the Crocker Citizens National Bank, Main Branch, San Mateo, California.

I am currently employed by Lazard Freres & Co. in California and my 1970 income tax returns will reflect that my entire salary for the year is taxable in this state. My social, civic and business activities have been concentrated for nearly a year and one-half in northern California.

As reflected in respondent's complaint and temporary injunction served on me in Connecticut, respondent has stated under oath that Hillsborough is my permanent residence.

I declare under penalty of perjury that the

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foregoing is true and correct.

Executed at San Francisco, California on November 30, 1970.

Charles F. Spalding

CHARLES F. SPALDING

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

In the Marriage of CHARLES F. SPALDING, Petitioner, and ELIZABETH C. SPALDING, Respondent.	NO. 155 616 DECLARATION OF CHARLES F. SPALDING

I, CHARLES F. SPALDING, declare and say:

I have commenced the present proceeding for dissolution of marriage from respondent, ELIZABETH C. SPALDING, to terminate, once and for all, the uncertain legal status between myself and respondent, and to conclude the long and sorry history of court proceedings between us in several states over our own marital status and my personal freedom to remarry and live free from what has become the aggravation, harassment, embarrassment and humiliation directed toward me by respondent. It is my belief that several of the prior legal proceedings in which I have participated were commenced by respondent with the sole purpose of harassing, humiliating and impoverishing me, and not with the intention of serving any useful or beneficial purpose to either of us or our children.

Respondent has recently moved this Court to dismiss

EXHIBIT No. B

or stay my dissolution proceeding commenced in this Court pending resolution of her own more recently filed divorce action in Connecticut, principally on the strength of a temporary injunction she has obtained ancillary to her divorce action in Connecticut allegedly restraining me from prosecuting or proceeding further with the present action. Because it is my present belief and contention that such actions by respondent have been initiated with a similar purpose of needlessly harassing me and preventing me from obtaining a dissolution of our marriage, I wish to set forth for the Court's information a brief account of the prior legal proceedings between the parties hereto. I suggest that the pattern of such proceedings indicates a consistent course of vindictiveness and harassment which has to date benefited no one except the attorneys involved.

Respondent and I were married in 1945 in Haverford, Pennsylvania, and there are six children of the marriage, four of whom are presently minors. Because of what we mutually agreed to be an intolerable living situation, respondent and I separated in November 1962. I agreed to pay and did pay support and child support during the period of separation. In November 1963, I assumed residence in the State of Nevada, and on March 19, 1964, I obtained a divorce from respondent in the Second Judicial Court of the County of Washoe, State of Nevada, which divorce decree incorporated orders directing my payment of $150 per month per child as child support and $500 per month to respondent as alimony. Because the business climate appeared to preclude my profitably pursuing investment banking opportunities in Nevada, I returned to New York City in the late spring of 1964. I lived there, except for a brief period in New Jersey, until my change of residence to California in 1969.

In April 1964, one month after my Nevada divorce

decree became final, respondent had commenced an action against me in the Supreme Court for Westchester County, New York, in which she prayed, in order to preserve her marital status and reputation, for a declaratory judgment that my Nevada divorce was invalid and that she continued to be my wife. Though I believed I had obtained a valid divorce in Nevada, I appeared in said action on advice of counsel. Judgment on the action was rendered March 13, 1968, in which judgment it was decreed that my Nevada divorce was null and void.

One month after commencement of the New York null. action described immediately above, respondent filed a divorce action against me in the Superior Court, Fairfield County, Connecticut, Docket No. 121 094. I was served with Summons therein in May 1964. For reasons best known to her, respondent withdrew such action on May 21, 1966, prior to obtaining a divorce decree, but after incurring substantial attorneys' fees both for myself and for her.

In June 1966, I commenced a proceeding in the Supreme Court of the State of New York, for the County of New York, to obtain custody of my children. Respondent vigorously opposed such action, and eventually filed a counter-claim against me which she proceeded to prosecute strenuously. In November 1966, such Court ordered that custody of my three sons be awarded to me, and custody of my three daughters be awarded to respondent. The Court further ordered that I pay respondent:

1) $200 per month child support for each child in her custody, or $600 child support per month in total;

2) All educational expenses for my children;

3) All past due and future real estate taxes on respondent's Greenwich, Connecticut home;

4) All past and future interest on any loan made in connection with the purchase of respondent's home;

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5) All fire insurance on respondent's home; and

6) $3,000 as counsel fees.

By Writ, Summons and Complaint dated April 28, 1967, respondent initiated an equitable support action against me in Superior Court, Fairfield County, Connecticut. Such action was eventually settled by stipulated judgment in January 1969, in which judgment I was ordered to transfer all right, title and interest in our former Greenwich, Connecticut home to respondent, pay respondent $1,600 per month for her support and maintenance, and $5,000 as her attorneys' fees for such action.

Respondent thereafter, in July 1968, attempted by order to show cause to modify the custody decree granted in November 1966, by requesting the custody of my two minor sons and an additional child support award in the total amount of $400 per month. She additionally requested that I pay the sum of $17,889.12, with interest, for repairs and other expenses incurred on her Greenwich home, and further counsel fees in the sum of $5,000.00. Lengthy affidavits and pleadings were filed by both parties in such proceeding.

On March 28, 1969, an Order Modifying Judgment was given by the Westchester County Supreme Court in response to such action, which order held, in pertinent part, as follows:

1) Petitioner was ordered to pay respondent $22,791.26 within 10 days from entry of judgment, costs of repairs and other expenses on her Greenwich home;

2) Petitioner was ordered to pay respondent $1,000.00 for counsel fees incurred therein; and

3) Petitioner's minor son, Richard C. Spalding, was allowed to determine with which parent he chooses to reside. In the event that Richard C. Spalding chose respondent, petitioner was ordered to pay respondent an additional $200

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in child support.

In May 1968, I married the former Amy Ann McGinnis Sullivan of Hillsborough. I commenced spending increasing amounts of time in California, and I determined to make California my permanent residence. Despite respondent's above mentioned then pending actions against me in New York for modification of the prior New York custody award, and in Connecticut for an equitable support award, respondent commenced an equitable proceeding in San Francisco Superior Court against me and my new wife to restrain my wife from using my name, and to restrain both of us from representing that we were married to each other. Although respondent lived, and continues to live, in Greenwich, Connecticut, and has not since the initiation of her suit personally appeared in California to prosecute such suit, respondent claimed that my new marriage caused her grievous embarrassment, humiliation and shame. Such suit was prosecuted vigorously by both sides, and I have to date incurred substantial attorneys' fees in defending the suit. The action was for all practical purposes mooted in December 1969, when my wife died.

Since July 1969, I have lived in California as a California resident. As noted above, I filed the present dissolution proceeding on September 15, 1970, seeking thereby to terminate conclusively the uncertainty concerning my marital status with respondent. Subsequent to filing such dissolution petition, I was served with a temporary injunction while visiting one of my children in Connecticut, which injunction purportedly restrains me from prosecuting the present action. Respondent has apparently re-commenced divorce proceedings against me in Connecticut, in which she claims to seek custody of all the minor children, temporary and permanent alimony, temporary and permanent support for all the minor

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children, and a permanent injunction restraining me from proceeding with this dissolution action.

I have done my best throughout the trying course of the above described litigation proceedings to comply with all orders of each of the various courts involved, to provide for respondent generously and fairly, and to be a devoted, attentive, and generous father. I have completely financed the education of my six children, and since the time of respondent's and my separation in 1962, I have expended well over $112,000 in support of such educational expenses. At the present time I expend the following amounts annually in support of respondent and my children:

1)	Alimony	$ 19,200
2)	Child support	7,200
3)	Education	17,000 (Est.)
4)	Real property taxes on respondent's home	3,000
5)	Fire and life insurance premiums	3,900
6)	Partial payments on prior court order for house maintenance	6,000
		$ 56,300

In addition, I have paid respondent $4,500 for plumbing repairs in 1964 for her Greenwich, Connecticut home. I have expended well over $15,500 in medical expenses for psychiatric treatment and consultation for respondent and my two eldest sons. I have paid dental fees of approximately $2,200 for orthodontic care for two daughters, and an additional $1,000 in medical expenses for injuries recently sustained accidentally by one of my daughters. I have paid respondent $9,000 in attorney fees for her various proceedings instigated against me, and I have incurred additional attorney fees in the approximate amount of $16,500 on my own behalf in contesting such proceedings. I have expended considerable funds, which I cannot

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estimate, in supporting my three sons who are in my custody, and I have modest or average expenses in supporting myself. I have made all the preceding payments conscientiously and with every effort and intention to provide for the well being of my family.

It is my belief that respondent has maintained a bitter, vengeful campaign to harass and punish me by means of the myriad legal proceedings outlined above. She presently resides in extreme comfort in a large home in Greenwich, Connecticut, where she lives largely on income derived from my support payments. It is my intention to continue to make such alimony and child support payments to respondent should a decree of dissolution be granted by this Court. To this end I am prepared to consent to the entry of an order in these proceedings that would continue such support payments until further order of any competent court. In addition to my payments, respondent has admitted, through her California counsel, to annual income of $7,400 derived from trust funds and rentals of a portion of the Greenwich residence. In May 1970, she further received liquid securities in the amount of $60,000.00 as a partial distribution from the estate of her recently deceased father. Finally, she is a one-quarter residuary legatee under her father's will of approximately $100,000.00 income to commence upon the death of her 76 year old mother.

Under the circumstances, respondent's present legal actions appear to perpetuate the same vindictive, purposeless course which she has followed before, and they cannot serve any useful purpose. I believe and request that I should be allowed to terminate, once and for all, my uncertain marital

******

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relationship with respondent.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California on November 30, 1970.

Charles F. Spalding

CHARLES F. SPALDING

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1249 Russ Building
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Attorneys for Respondent

FILED
DEC 11 1970
MARVIN CHURCH, County Clerk
By [signature]
DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

In re the marriage of CHARLES F. SPALDING, Petitioner, and ELIZABETH C. SPALDING, Respondent.	No. 155616 RESPONDENT'S CLOSING MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR STAY ACTION

Petitioner's Memorandum and attached Declarations place great stress upon two points: (1) That petitioner is a resident of the State of California; and (2) That petitioner is entitled to terminate his "uncertain marital status" with respondent because of "the long and sorry history of court proceedings" between the parties. Respondent submits that neither of these points would constitute sufficient reason to deny a stay of this action. Assuming (without in any sense conceding) that petitioner is domiciled in this State, there are compelling reasons why this action should not now proceed.

I

RESPONDENT IS ENTITLED TO ADEQUATE LEGAL PROTECTION OF HER SUPPORT RIGHTS

Surely this Court will not compel respondent to accept

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LAMSON, JORDAN,
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petitioner's statement of intention to continue to pay for her support as her only assurance thereof. Respondent is entitled to adequate legal protection for her continued support. The attached affidavit of respondent shows that he is not as financially responsible to her as he claims. Counsel for petitioner conceded at oral argument that a judgment of dissolution herein would probably terminate the existing support order in Connecticut.[1] He suggested that the problem might be obviated by the entry of a new order for alimony in the Connecticut divorce action. But this suggestion is fraught with difficulties. Once the marriage is dissolved here in California, all rights to temporary or permanent alimony, as well as support under the existing order, may well terminate as far as Connecticut is concerned. Respondent has not found a Connecticut case to that effect, but there are some states which take this view. Thus, in Leflar, American Conflicts Law, it is stated:

> "Some states will under some circumstances award alimony after the marital status has already been ended by divorce; others will not. States in the latter group take the position that the grant of alimony ought to accompany the divorce if it is to be made at all, that after the marital status is ended even by ex parte divorce there no longer should be any right of support, therefore no right to alimony. . . . If the wife sues for separate support in her domiciliary state after the husband has secured an ex parte divorce at his domicile, and the forum state is one of those that allows such after-divorce alimony, she may win." (pp.552-553) (Emphasis added.)

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[1] As further evidence of the nature of spousal support rights prevailing in the New England states, see Jurczyk v. Jurczyk (1965) 232 Cal.App.2d 270, where the court found that under Massachusetts law, a Massachusetts support decree was terminated when the husband subsequently obtained an ex parte divorce in Nevada. See also Loeb v. Loeb (1958) 4 N.Y.2d 542, 152 N.E.2d 36.

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See also "Divorce - Constructive Service - Alimony", 28 A.L.R.2d 1378, and see Paulsen, "Support Rights and an Out-of-State Divorce", 38 Minn. L. Rev. 709 (1954). These states seem to take the view that the wife must appear in the husband's divorce action if she desires alimony. The injustice resulting to the wife if the forum chosen by the husband is a distant one, as in this case, can only be avoided if the forum declines to hear the case. It seems likely that Connecticut would follow this unfortunate rule in light of the Connecticut cases cited in our opening memorandum. Respondent's position in Connecticut after a California divorce would not be as secure as petitioner would have the Court believe.

Counsel for petitioner also suggested at the hearing that respondent would be well protected by the entry of a support decree in this action. But the alleged protection is illusory. As indicated in our opening memorandum, Connecticut will not enforce a foreign support decree except as to past due installments, i.e., the California decree could not be established in Connecticut as a continuing decree thereafter enforceable through the contempt power. (Cf. Worthley v. Worthley (1955) 44 Cal.2d 465.)

If Connecticut will not prospectively enforce a California support decree, then it seems to follow that Connecticut would also refuse to modify it. The significance of this factor looms large in light of petitioner's intention announced at the hearing to seek a reduction of his present payments to respondent. Although he indicated that the proposed modification would be litigated in Connecticut, we strongly doubt that such would be the case. Petitioner could at any time request a modification hearing in this court, three thousand miles from respondent's domicile, which is the state in which he originally undertook to pay her support through a stipulated judgment.

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Finally, the Court should consider respondent's correlative right to an increase in her support.[2] Because Connecticut would not undertake to modify a California decree, respondent would be compelled to travel to California for this purpose also. Furthermore, the question of modification - whether upwards or downwards - could not even be litigated in the existing Connecticut divorce action once this Court dissolves the marriage if Connecticut, as appears likely, will no longer entertain jurisdiction of respondent's right to alimony.

In summary, denial of a stay order herein will have the effect of (1) compelling respondent to appear herein to insure protection of her support, and (2) channeling any and all future litigation concerning respondent's support into California - a manifestly unfair result.

II

JUSTICE WILL BE SERVED - NOT THWARTED - BY A STAY ORDER

Respondent is not asking for an immediate dismissal of this action, only a stay thereof. Thus, this Court would retain the jurisdiction it presently has.

Respondent agrees with petitioner that there must be a divorce. The only area of disagreement concerns the proper jurisdiction in which to have it. Furthermore, petitioner has asserted nothing in either his written or oral presentation to demonstrate the need for an immediate divorce even at the risk of prejudicing respondent's support. Counsel implied that respondent might unduly delay the Connecticut divorce action or even dismiss

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2 The present $19,200 in spousal support is minimal in relation to petitioner's gross income. (See Declaration of Michael P. Carbone attached hereto.)

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it as part of a campaign to "harass" him. But if that were to happen, this Court could then lift its stay order.

Counsel advised the Court at the hearing that petitioner would defend the Connecticut action. Thus, there is no apparent need to go forward with this action now and raise needless conflict of laws problems for the Connecticut court by further proliferating litigation. Respondent submits that justice would therefore be served, not thwarted, by entry of a stay order herein so that the Connecticut court can adjudicate all the rights of the parties.

III

THE CONNECTICUT INJUNCTION SHOULD BE RESPECTED

We submit that the foregoing discussion demonstrates the wisdom of the Connecticut injunction. However, if any doubt remains, this Court should defer as matter of comity, to the judgment of the Connecticut court - particularly where petitioner has not yet seen fit even to ask the Connecticut court to lift its injunction.

As petitioner's own declaration graphically illustrates, he has followed a migratory pattern of residence over the last eight years. As a "runaway spouse" (to use his counsel's term) he obtained in March 1964 a void divorce in the State of Nevada. Later on, for a period of almost one year, he reduced respondent's support to the sum of $200.00 per month until she was able to commence a support action against him in Connecticut. Now he seeks to obtain an ex parte divorce in this state which, despite his present affirmations of good faith, will again prejudice her support rights.

Connecticut is the matrimonial domicile and the residence of respondent and the children. It has personal

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jurisdiction of both parties. It is obviously the state most vitally concerned with this case. As such, it has granted an injunction which restrains petitioner from further forum-shopping at the expense of his wife. This Court should not aid petitioner in committing contempt of the court of another state.

IV

CONCLUSION

Petitioner's interest in opposing a stay order - assuming that he really does not intend to prejudice respondent's support rights - would appear to be a desire for a speedy divorce. Respondent submits that the necessity for a just disposition of the entire case clearly overrides any such desire on petitioner's part.

Dated: December 10, 1970.

Respectfully submitted,

LAMSON, JORDAN, WALSH & LAWRENCE

By Michael P. Carbone
Michael P. Carbone
Attorneys for Respondent

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

In re of the Marriage of	:	
CHARLES F. SPALDING,	:	
Petitioner,	:	NO: 155 616
and	:	
ELIZABETH C. SPALDING,	:	AFFIDAVIT OF ELIZABETH C. SPALDING
Respondent,	:	

I am the respondent in this action and I make this Affidavit in support of my Motion to Dismiss or stay this action and in response to the declaration of Charles F. Spalding (Exhibit B) filed herein in opposition to my motion.

Contrary to the statements contained in his declaration my husband has been derelict in his obligations to support me and my children since our separation.

Our separation in November, 1962 was not by mutual agreement; he deserted me.

He obtained an ex parte decree of divorce in the State of Nevada in March, 1964 (later nullified by the Supreme Court of New York) which provided for payment of $500.00 alimony. During the period of time from May 1966 to April 1967 when I commenced my equitable support action in the State of Connecti-

cut and was able to serve Mr. Spalding with process in that action, he paid only the sum of $200.00 per month for my support.

The New York custody order of June, 1966 referred to on page 3 of this declaration requires him to pay real property taxes and also necessary repairs on the house in Greenwich, Connecticut where I reside with our children. In March, 1969, he was delinquent of those obligations and the court rendered judgment on account of such delinquency in the amount of $22,791.26. At this time, he is delinquent in the amount of approximately $6,000.00 for taxes and $7,000.00 for repairs and I have made demand upon him for said amounts.

During the past three months, two of the three alimony and support checks in the total amount of $4,400.00 which I have received from Mr. Spalding have been returned unpaid for insufficient funds.

Mr. Spalding's statement on page 7, line 24 of his declaration that I will receive approximately "$100,000.00 income" upon the death of my mother is inaccurate. I will receive instead annual income from approximately $100,000.00. My mother is still living.

Elizabeth C. Spalding
ELIZABETH C. SPALDING

Subscribed and sworn to before me on December 9, 1970, at Stamford, Connecticut.

Richard A. Silver
RICHARD A. SILVER
COMMISSIONER OF THE SUPERIOR COURT
Fairfield County, State of Conn.

LAMSON, JORDAN, WALSH & LAWRENCE
1249 Russ Building
San Francisco, California 94104
Telephone: 392-4142

Attorneys for Respondent

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

In re the marriage of CHARLES F. SPALDING, Petitioner, and ELIZABETH C. SPALDING, Respondent.	No. 155616 DECLARATION OF MICHAEL P. CARBONE

I, the undersigned, declare under penalty of perjury that the following is true and correct.

I am an associate of the firm of Lamson, Jordan, Walsh & Lawrence, attorneys for respondent herein.

In the course of attempting to negotiate a property settlement between the parties hereto, I exchanged information with opposing counsel regarding the financial situation of our respective clients. Information furnished by the undersigned is the source of the statements contained in petitioner's Declaration herein (EXHIBIT No. B) at page 7, lines 17 through 25.

In the course of said exchange I received the attached "Affidavit of Charles F. Spalding" dated June 26, 1970. To my knowledge it has never been filed in the court for which it was prepared and the blank spaces on the first page thereof have

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never been filled in; however, the second page thereof shows that petitioner has a gross annual income of $126,000.00. In addition, I also received the attached "Annual Income Statement" and "Balance Sheet." (The handwritten notations thereon are the result of verbal corrections later given by petitioner's attorneys.) I was also informed by petitioner's attorneys that the $17,000.00 in educational expenses mentioned in the attached Affidavit are paid in whole or in great part from a trust established by petitioner's mother and not from his personal funds. It will be noted that this $17,000.00 item is not listed in petitioner's "Expenses" in the Annual Income Statement.

Respondent's filing of the declaratory relief action in the San Francisco Superior Court, referred to in petitioner's Declaration at page 5, was for the purpose of obtaining a judicial declaration that petitioner's remarriage following his void ex parte divorce in Nevada was invalid. Respondent sought through said action a clarification of her marital status. Her initiation of this action in California was upon advice of counsel that California was the proper forum because the remarriage had taken place here. The exchange of financial information referred to above was at the suggestion of the Honorable Henry R. Rolph who heard motions for summary judgment in the action. Neither the institution of the action nor subsequent negotiations by respondent should be construed as indicating a willingness on her part to undertake the burden of having to litigate all of the complex aspects of her marital situation in this distant forum.

Executed in San Francisco, California, this 11th day of December, 1970.

Michael P. Carbone

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Attorneys for Defendants

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

ELIZABETH C. SPALDING, Plaintiff, vs. CHARLES F. SPALDING and AMY ANN SULLIVAN a/k/a AMY ANN SPALDING, Defendants.	NO. 559 884 AFFIDAVIT OF CHARLES F. SPALDING

STATE OF CALIFORNIA)
) ss.
City and County of San Francisco)

CHARLES F. SPALDING, being first duly sworn, deposes and says:

I am one of the defendants in the above-entitled action. My counsel have advised that the Court wishes me to set forth in detail an account of my personal financial situation. Attached hereto as Exhibit "A" is my personal net worth statement, which I have read and which I believe accurately represents and details my total assets and liabilities and current income and expenditures.

I have total assets of approximately $, a portion of which is represented by accounts receivable as shown on the attached statement. I have current outstanding liabilities of $

My annual income is approximately $ 126,000.00, and is derived principally from my salary as an investment consultant for Lazard Freres & Co. I pay alimony of $19,200 per year, child support amounting to $7,200 per year, and tuition and educational expenses for five of my six children amounting to approximately $17,000 per year. I also pay real property taxes of $3,000 per year, and fire and life insurance premiums totalling $5,000 per year. On the basis of such income and expenditures, my annual net cash income exclusive of ordinary living expenses and before United States and California income taxes is approximately $ 74,600.00.

The foregoing facts are within my personal knowledge and if sworn as a witness, I can testify competently thereto.

EXECUTED on June 26, 1970 at San Francisco, California.

Charles F. Spalding
CHARLES F. SPALDING

SUBSCRIBED to and SWORN to before me this 26 day of June, 1970.

/s/ Doris I. Martin
DORIS I. MARTIN
Notary Public
STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO

CHARLES F. SPALDING

ANNUAL INCOME STATEMENT

INCOME	
Salary - Lazard Freres & Co.	$ 60,000.00
Investment - Robert Morrison, Inc. (Real Estate Co. - 5% Interest)	10,000.00
Estates - Amy Ann Spalding	50,000.00
Trusts - Vaughn Spalding Trust	6,000.00
Total Income	$ 126,000.00
EXPENSES	
Alimony and Child Support Elizabeth Spalding	$ 26,400.00
Interest - Loan From:	
Vaughn Spalding Trust	12,000.00
Florence Spalding	4,500.00
Life Insurance Premiums	3,900.00
Personal Living Expenses	14,400.00
Salary Attachment (Elizabeth)	6,000.00
Taxes and Maintenance - Greenwich Residence	3,000.00
Income Taxes - Federal and State	37,000.00
Total Expenses	$ 107,200.00
Net Cash Available	$ 18,800.00

CHARLES F. SPALDING

BALANCE SHEET

ASSETS	
Cash	$ 23,800.00
4,000 Shares Utah Shale at $4.00 Per Share	16,000.00
Note Receivable - John D. St. Phalle	80,000.00
Investment - 5% Interest in Robert Morrison, Inc.	50,000.00
Cash Value of Life Insurance	-0-
Total Assets	$169,800.00
LIABILITIES	
Note Payable to Mother	$ 60,000.00
Balance Due Elizabeth Spalding Per New York Decree	18,000.00
Attorneys' Fees	15,000.00
Total Liabilities	$ 93,000.00
Net Worth	$ 76,800.00

76
18
$94

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Attorneys for Petitioner

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

In re the Marriage of CHARLES F. SPALDING, Petitioner, and ELIZABETH C. SPALDING, Respondent.	NO. 155 616 PETITIONER'S RESPONSE TO RESPONDENT'S CLOSING MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR STAY ACTION

INTRODUCTION

After reviewing respondent's Closing Memorandum, petitioner respectfully submits that nothing new has been added to the original Memorandum or counsel's presentation in open court with respect to the legal issues involved. Respondent is still waiving her arms in supposed mortal terror of possible prejudice which may occur as a result of the dissolution proceedings commenced by petitioner. Instead, respondent has attempted to divert the Court's attention from the cognate legal issue involved, i.e., the right of a bona fide California resident to process a dissolution proceeding to conclusion by attempting to create spurious factual issues on tangential points. As will be demonstrated herein, these "red herrings" are insignificant, even where conceivably factual, and should be accorded no weight in the Court's determination of the motion.

RESPONDENT'S LEGAL ARGUMENTS ARE WITHOUT MERIT AND MUST YIELD TO PETITIONER'S RIGHT TO PROCEED WITH HIS DISSOLUTION

Counsel for respondent concedes that respondent's support rights merely may be affected on page 2 of his Memorandum. To my knowledge I never, as he suggests, indicated that a possible method of protecting petitioner's rights would be the entry of an order for alimony in the Connecticut divorce action. To the contrary, I indicated that petitioner will respond to that matter in due course. However even assuming that I had, the authority upon which respondent purports to rely to indicate that a California dissolution decree might destroy the effectiveness of such a stipulated Connecticut order is inapposite. In his quotation from Leflar, American Conflicts Law, the situation therein contemplated involves a suit by the wife and her domiciliary state after the husband has secured an ex parte divorce at his domicile. Of course, here the facts are quite the opposite, in that respondent has safely filed her action for divorce, etc. in Connecticut long before petitioner will have obtained his California decree of dissolution. Thus, this supposed avenue of potential prejudice can be safely put aside.

Taking petitioner's next point, it is equally devoid of merit. The entry of a California support decree providing for identical payments to be made to respondent by petitioner is eminently fair to her and as protective of her rights as any court decree can be, given the premise that respondent lives in Connecticut and petitioner lives in California. As was argued to the Court at the hearing, interstate enforcement problems are ever present when two parties live in different states, no matter which state has issued the decree, the state of the party entitled to the support, or the state of the party obligated to pay the support. Here, again, respondent adds

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nothing to her opening argument in this regard and it together with the previous subject should be dismissed from further consideration by the Court.

With respect to the so-called dire results that will occur if the stay order requested herein is denied, petitioner can only restate what was stated to the Court in oral argument and what appears in petitioner's Declaration. This respondent apparently has limitless resources with which to conduct litigation she has against petitioner in three states over a period of eight years. She has never seemed to lack the wherewithal (a large portion of which has been supplied by petitioner) to litigate against petitioner when and where she chose. She has already once demonstrated her ability to come into California by filing the declaratory relief action in the San Francisco Superior Court in 1968, a suit which should have long since been voluntarily dismissed on the grounds of mootness due to the death of petitioner's former wife. Thus, even if she felt "compelled" to appear in this proceeding which, of course, she need not do to protect her rights, the simple historical fact is that she is already here in litigation as a plaintiff in the Superior Court of the City and County of San Francisco through the same counsel who are appearing for her in this matter. It is respectfully suggested that there is no great additional hardship in her moving down the Peninsula 30 miles to litigate in Redwood City if she desires to do so.

Of course, permitting petitioner, a bona fide California resident, to proceed with his dissolution action does not "channel" any and all future litigation into California. Respondent has filed her action for divorce, etc. in Connecticut and can litigate to her heart's content respecting her support and property rights in Connecticut.

It is encouraging to see that respondent has now

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abandoned her efforts to convince this Court that it must dismiss petitioner's validly filed dissolution action, as she does on page 4 of her Closing Memorandum. It might be noted in passing that respondent does not attack in any aspect the clear and indisputable evidence of petitioner's bona fide California residence and, indeed, even assumes, without conceding, that such residence exists. Instead, she now is dwelling on a stay which is only sought, it is respectfully submitted, for dilatory purposes and to further harass and prevent petitioner from clarifying his marital status once and for all. As this Court is well aware, in the domestic field it is not unusual that parties are litigating in two different forums simultaneously and certainly the Spaldings would not be the first persons to have done so. Therefore, the idea that a dissolution action in California filed by a bona fide resident should be stayed so that a Connecticut party litigant can have her day in court first on the basis of a subsequently filed divorce action is nothing short of ludicrous.

On the subject of the Connecticut injunction, the Court is well aware that it has been obtained ex parte and, as was represented in court, it will be defended by petitioner's Connecticut counsel. The motion presently before this Court is of first importance, since the granting of such motion will unfairly delay petitioner in his attempts to clarify his matrimonial status once and for all and, accordingly, it is only logical that this matter be dealt with first.

• RESPONDENT IS ATTEMPTING TO CREATE SPURIOUS FACT ISSUES THROUGH AFFIDAVITS

Turning to respondent's affidavit attached to the motion, which is obviously a last minute attempt to inject fact issues from a safe distance of 3,000 miles, petitioner would preliminarily point out that there is clear evidence in the

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proceeding before this Court of respondent's sometimes liberties with the truth. We refer to respondent's denial of personal service upon her of the dissolution papers when there resides in the file a sworn affidavit by a Connecticut sheriff to such effect. It is all very well for respondent to sit back in Greenwich, Connecticut and make statements of a conclusory nature or of a factual nature which are simply incorrect, all the while safe from cross-examination. In sharp contrast, petitioner backed up his declarations, which are largely undisputed, with his personal presence to stand cross-examination thereon. One question was put to him concerning real estate taxes which he fully answered.

Based upon his affidavit, there is absolutely no truth to the statement that petitioner reduced respondent's spousal support from $500 to $200 for a period of eleven months in 1966-1967. Nor is there any truth to the fact that he is delinquent in the amounts of support for taxes and repairs as set forth on the second page of her affidavit. As he testified on cross-examination at the hearing, he has not been presented with any statements for Connecticut real property taxes which he has not yet paid. Obviously, he has no way of knowing the amount of the taxes so he can pay them until the tax bills are presented to him by petitioner who receives them as the land owner. While it is quite true that respondent may have made demand upon petitioner for $7,000 for repairs to the Greenwich residence, she points to no order quantifying such amount. As is indicated in petitioner's Declaration, Exhibit "B", on pages 3 and 4, such amounts arise from the open ended nature of the New York decree and require court order before they become a fixed obligation of respondent and before he could be considered delinquent for failure to pay them.

As to the alimony matter, the last item by which respondent

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attempts to confuse the Court with a spurious fact issue, it is the fact that for approximately six days in November, from November 20 to November 26, there was an overdraft in petitioner's checking account at the Main Branch, San Mateo Office of the Crocker Citizens National Bank. Upon being advised of this fact by respondent, petitioner dispatched $5,000 on or about November 26, and to date and to his knowledge, petitioner has not seen fit to re-submit her November support check of $2,200 for payment, which would be made. The only other support check which could be at issue is the one which respondent sent to petitioner by registered mail and if she has not seen fit to present it to the bank for payment, this is her problem and not a delinquency on the part of respondent.

With respect to the last item of her affidavit, counsel will shoulder the blame for a typographical error. It is correct that Mrs. Elizabeth Spalding will, upon her mother's death, receive annual income as a residuary trust beneficiary from corpus of approximately $100,000, and not $100,000 of income as inadvertently stated in petitioner's Memorandum. This is symptomatic of the nit-picking and straw-grasping tactics which respondent is engaging in to continue her program to harass, vex and annoy petitioner by delaying him from obtaining his decree of dissolution.

Turning to the Declaration of counsel, we again see attempts to divert the Court's attention from the real issue involved, i.e., the right of a bona fide California resident to obtain a simple decree of dissolution. As he points out correctly, the affidavit of Charles Spalding was sent to him in an attempt to negotiate a settlement of this matter. It was not in final form at that time and ready for filing, and therefore, the absence of an amount in the assets and liabilities items on page 1 is understandable. Yet, more to the point, and what is either inadvertently

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or deliberately overlooked by counsel is that if he was genuinely interested in the total assets and total liabilities of Mr. Spalding, he could simply turn to the balance sheet which is attached to the affidavit and find that Mr. Spalding lists total assets of $169,800, total liabilities of $93,000, leaving a net worth of $76,800. So far as the educational expenses of $17,000 are concerned, petitioner submits that there is no distortion in the statement by reason of the absence of the $17,000 item in the expense portion of the statement because there is no listing of the $17,000 in the income portion of the statement. The form of this statement was determined by the undersigned and since the educational expenses are not funds which are paid to petitioner but are paid directly to the schools involved, it was determined that they should not appear in the income statement, nor should their source. Thus, there is no financial distortion of the statement, the whole purpose of which was to demonstrate the amount of money available for additional payments to respondent in the event that the parties could have settled their differences via a property settlement agreement.

Lastly, counsel attempts to protect his client's position that litigation in California works a serious hardship upon her. She was apparently oblivious to this hardship when she filed her action in San Francisco Superior Court in 1968, chasing petitioner some 3,000 miles across the country to file suit against him. Now that he, as a bona fide California resident, has filed dissolution proceedings in California, we hear a wail and cry of hardship from Connecticut. As stated earlier in this Memorandum, assuming arguendo that there is such a hardship, petitioner has her own action in proceedings in Connecticut, where she can achieve all of the relief she is entitled to. But the plain historical fact of the matter is that respondent has the resources to continue proceedings in California should she,

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on the advice of her counsel, so desire. This feigned hardship and burden should play no part in this Court's determination of this motion.

CONCLUSION

Based on the legal arguments detailed in petitioner's earlier Memorandum, which have in no way been disputed or controverted with different authority by respondent in her Closing Memorandum, and also based on petitioner's unequivocal agreement to the entry of a California decree requiring his payment of support to or for respondent and his children in the amounts he is presently paying, petitioner contends the only proper and equitable decision which can be reached by the Court is to dismiss respondent's motion. Such demand will allow both parties to proceed with actions which they have commenced in their separate domiciliary states to a conclusion. To do otherwise would make this Court an instrument of a foreign jurisdiction in denying a bona fide California resident the right to the full use of California legal processes. Assuming the Court denies respondent's motion, petitioner requests that in light of the 45 days which respondent has previously enjoyed to file a response to the petition, that she be ordered to file such response not more than ten days from the date of entry of the Court's order.

Respectfully submitted,

COOPER, WHITE & COOPER

By R. Barry Churton
R. Barry Churton
Attorneys for Petitioner

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& COOPER
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N FRANCISCO 94104

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FILED

JAN 7 - 1971

MARVIN CHURCH, County Clerk

By Edward Sibley
DEPUTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR

HEARING DATE: DECEMBER 1, 1970 THE COUNTY OF SAN MATEO

Present Ho. LYLE R. EDSON, Judge of the Superior Court

No. 155 616 IN RE THE MARRIAGE OF CHARLES F. SPALDING AND ELIZABETH C. SPALDING

MOTION TO STAY ACTION OR TO DISMISS

TO STAND SUBMITTED ON DECEMBER 16, 1970 upon the filing OF RESPONDENT'S P/A IN ANSWER TO PETITIONER'S P/A FILED THIS DATE.

R. Berry Churton for petitioner
Michael F. Carbone for respondent Submitted _____, 19____

DECISION

The Court having considered the petitioner's unequivocal agreement to the entry of a California decree requiring the payment by him of support to or for respondent and his children in the amounts he is presently paying, and further considering the argument of counsel,

The motion of respondent for an order to stay or dismiss this action is denied. Counsel for Petitioner to prepare form of Order.

Respondent to file a response in these proceedings within twenty (20) days from the entry of said Order.

Dated: January 7, 1971

Lyle R. Edson
Judge of the Superior Court

January 7, 1971. I certify that I mailed copies of this memorandum of decision and order to counsel of record on January 7, 1971.
MARVIN CHURCH, COUNTY CLERK-RECORDER
Edward Sibley
EDWARD SIBLEY, DEPUTY CLERK.

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Attorneys for Petitioner

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

In re the Marriage of

CHARLES F. SPALDING,

Petitioner,

and

ELIZABETH C. SPALDING,

Respondent.

NO. 155 616

ORDER DENYING MOTION TO STAY OR DISMISS ACTION

This motion regularly came on for hearing before the Court on December 1, 1970. R. BARRY CHURTON of the firm of COOPER, WHITE & COOPER appeared for petitioner and MICHAEL F. CARBONE of the firm of LAMSON, JORDAN, WALSH & LAWRENCE appeared for the respondent. The Court having heard the testimony of CHARLES F. SPALDING, having read the affidavits of both parties filed herein and having considered oral and written arguments submitted by both parties, has filed its decision denying respondent's motion to stay or dismiss action on January 7, 1971. The Court, having requested in its decision that an order be entered pursuant to the terms of its decision,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that respondent's motion to stay or dismiss this action be and the same is hereby denied;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that

petitioner, during the pendency of this proceeding, and until further order of this Court, continue to make all support payments for the benefit of respondent and his children as are currently required of him by the orders of the Courts of the states of Connecticut and New York.

IT IS FURTHER ORDERED that respondent shall file her response in these proceedings not later than 20 days after the date of the entry of this order.

DATED: January 14, 1971.

Lyle R. Edson

Judge of the Superior Court

LYLE R. EDSON

Name, Address and Telephone Number of Attorney(s)

COOPER, WHITE & COOPER
44 Montgomery Street, Suite 3300
San Francisco, California 94104
Telephone: 433-1900

Attorney(s) for Petitioner

Space Below for Use of Court Clerk Only

FILED
JUN 11, 1971
KAREN CHURCH, County Clerk
By [signature] DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN MATEO

In re the marriage of

Petitioner: CHARLES F. SPALDING
and
Respondent: ELIZABETH C. SPALDING

Default entered as requested, on June 11, 1971
By [signature]
☐ Default NOT entered as requested (state reason on reverse side).

CASE NUMBER: 155616 Court 6

REQUEST AND DECLARATIONS RE DEFAULT (MARRIAGE)

I. REQUEST TO ENTER DEFAULT

TO THE CLERK: Please enter the default of the respondent who has been regularly served with process and who has failed to appear or respond to the petition within the time allowed by law.

Date June 1, 1971

[signature]
Attorney(s) for Petitioner

II. DECLARATION OF NON-MILITARY STATUS

Respondent is not in the military service or in the military service of the United States as defined in Section 101 of the Soldiers' and Sailors' Relief Act of 1940, as amended, and not entitled to the benefits of such act.

* I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 3, 1971 (Date), at New York City (Place), California.

/s/ Charles F. Spalding
(Signature of Declarant)
CHARLES F. SPALDING
(Type or print name of Declarant)

/s/ Vivian Edwards
Notary Public

III. DECLARATION RE MEMORANDUM OF COSTS

Clerk's Filing Fees	$ 36.00
Process Server's Fees	$ 40.00
Notary Fees	$
	$
	$
	$

I am the party who claims these costs. To the best of my knowledge and belief the foregoing items of cost are correct and have been necessarily incurred in this proceeding.

* I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 3, 1971 (Date), at New York City (Place), California.

/s/ Charles F. Spalding
(Signature of Declarant)
CHARLES F. SPALDING
(Type or print name of Declarant)

/s/ Vivian Edwards
Notary Public

* A declaration under penalty of perjury must be made on reverse side for Financial Statement and Declaration of Mailing)

Form Adopted by Rule 1286 of Judicial Council of California Effective January 1, 1970

REQUEST AND DECLARATIONS RE DEFAULT (MARRIAGE)

IV. FINANCIAL STATEMENT

The value of each asset and the amount of each obligation subject to disposition by the court is:

Description of asset /obligation	Asset $	Obligation $

* I declare under penalty of perjury that the foregoing, including any attachments, is true and correct.

Executed on _____ (Date)

at _____ (Place), California.

_____ (Signature of Petitioner-Declarant)

_____ (Type or print name)

V. DECLARATION OF MAILING

On the date stated below, I mailed (by first-class mail or airmail, postage prepaid) a copy of this Request and Declarations re Default to the respondent's attorney of record, or if none, to respondent at his last known address, addressed as follows:

Mrs. Elizabeth C. Spalding
Hill Road
Greenwich, Connecticut

* I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 9, 1971 (Date)

at San Francisco, California.

Alan L. Fox (Signature of Petitioner or Attorney)

ALAN L. FOX (Type or print name)

* A declaration under penalty of perjury must be executed within California. If document is executed outside California, attach an affidavit.

73

Name, Address and Telephone Number of Attorney(s)

COOPER, WHITE & COOPER
44 Montgomery Street
San Francisco, California 94104
Telephone: 433-1900

Attorney(s) for Petitioner

Space Below for Use of Court Clerk Only

FILED
JUN 11 1971
MARVIN CONDON, County Clerk
By Sue Mack
DEPUTY CLERK

ENT. JUN 11 1971 VOL. 387 1119

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

In re the marriage of

Petitioner: CHARLES F. SPALDING

and

Respondent: ELIZABETH C. SPALDING

CASE NUMBER

155 616

INTERLOCUTORY JUDGMENT OF DISSOLUTION OF MARRIAGE

This proceeding was heard on June 11, 1971 (Date) before the Honorable GERALD E. RAGAN,

Department No. 12.

The court acquired jurisdiction of the respondent on September 23, 1970 (Date) by:

☒ Service of process on that date, respondent not having appeared within the time permitted by law.

☐ Service of process on that date and respondent having appeared.

☐ Respondent on that date having appeared.

The court orders that an interlocutory judgment be entered declaring that the parties are entitled to have their marriage dissolved. This interlocutory judgment does not constitute a final dissolution of marriage and the parties are still married and will be, and neither party may remarry, until a final judgment of dissolution is entered.

The court also orders that, unless both parties file their consent to a dismissal of this proceeding, a final judgment of dissolution be entered upon proper application of either party or on the court's own motion after the expiration of at least six months from the date the court acquired jurisdiction of the respondent. The final judgment shall include such other and further relief as may be necessary to a complete disposition of this proceeding, but entry of the final judgment shall not deprive this court of its jurisdiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

The Court also orders that, until further order of this Court, petitioner continue to make all support payments for the benefit of respondent and his children as are currently required of him by the orders of the courts of the states of Connecticut and New York, as the same may from time to time be modified.

Date: June 11, 1971.

Gerald E. Ragan
Judge of the Superior Court

Form Adopted by Rule 1287 of Judicial Council of California Effective January 1, 1970

INTERLOCUTORY JUDGMENT OF DISSOLUTION OF MARRIAGE

219-7

ORIGINAL

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

In re the marriage of
CHARLES F. SPALDING,
Petitioner,
and
ELIZABETH C. SPALDING,
Respondent.

NO. 155 616

FILED
JUL 29 1971
MARVIN CHURCH, County Clerk
By [signature]
DEPUTY CLERK

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Before: HON. GERALD E. RAGAN, Judge
Department No. 12
Friday, June 11, 1971

A P P E A R A N C E S:

For the Petitioner: COOPER, WHITE & COOPER
By: R. BARRY CHURTON, Esq.
44 Montgomery Street
San Francisco, California

CONSTANTINE CONSTANT, C.S.R.
OFFICIAL COURT REPORTER

PROCEEDINGS

Redwood City, California

Morning Session. Friday, June 11, 1971

THE CLERK: Spalding versus Spalding.

You are Mr. Spalding?

MR. SPALDING: I am.

CHARLES F. SPALDING,

called as a witness on behalf of the Petitioner, being first duly sworn, was examined and testified as follows:

THE CLERK: And your name, sir, is Charles F. Spalding?

THE WITNESS: That's correct.

THE CLERK: Thank you. Would you be seated, please?

MR. CHURTON: Your Honor, default has not yet been entered in this case, and I would first like to request that default be entered. The Petitioner filed his petition in the matter on September 15th, 1970. Respondent, who is a Connecticut resident, was served personally in Connecticut on September 23rd, 1970. She has not answered or otherwise appeared in the matter. Request for entry of default has been sent to Respondent and to her attorney.

THE COURT: What happened to the original summons in the case?

MR. CHURTON: We believe, Your Honor, that the original summons was served on the Respondent in Connecticut

and we, under the circumstances, were concerned lest any problem arise without any summons, and we checked the statutes, and the Code of Civil Procedure says the affidavit of personal service, which is in the file, constitutes sufficient affidavit for lost summons.

I have also spoken with Judge Carey about this, Your Honor, and he said,"Under the circumstances, if you, counsel, file a declaration of lost summons, this will be sufficient," and I have a declaration if you would like it.

THE COURT: That's what I was going to suggest. I was going to suggest that we proceed and hold off until you would prepare one. If you have one prepared, that would certainly suffice. That would raise an interesting point under personal service, which was probably invalid at that time, which would probably be valid now. From looking at the file, she has evidently obtained counsel and proceeding separately as far as division of property and things along that line.

All right. One other thing, if you would. If you know, nobody signed the declaration. I think it would be perfectly proper. Do you know if this was mailed to Mr. Carbone?

MR. CHURTON: It was mailed to Mr. Carbone. We also have a declaration of mailing which I signed indicating that the Respondent was also served with an entry of default. The Clerk's Office downstairs had a problem with the request

being sent to Mr. Carbone rather than to the Respondent in the case. They did not realize when they first looked at the file that she had retained counsel. Actually, it was extremely important in this matter, and so actually it was sent to Mr. Carbone and to the Respondent.

THE COURT: Where is it in the file?

MR. CHURTON: You have the request to Mr. Carbone.

THE COURT: But it's not signed, blank, which is, you know, you might as well file a blank paper. Do you have one signed?

MR. CHURTON: Yes, I do, Your Honor. May I give this to you at the same time as the declaration of lost summons?

THE COURT: Let's do that. Let's submit a signed declaration of mailing to one or the other, or both, the declaration for the lost summons, and with that you may proceed. Default will be entered based on your supplying the Court with that information.

MR. CHURTON: Thank you, Your Honor.

EXAMINATION BY MR. CHURTON

Q Mr. Spalding, you are the Petitioner in the matter of Spalding versus Spalding?

A I am.

Q Your present residence address is 1832 Floribunda Avenue, Hillsborough, California?

A That's correct.

[5]

Q Mr. Spalding, you have been a resident of the State of California for the last six months prior to the filing of your petition on September 15th, 1970?

A I have.

Q And a resident of the County of San Mateo for at least three months prior to the filing of the petition?

A Correct.

Q Mr. Spalding, is it correct to say that there are irreconcilable differences which have arisen between you and your wife which have led to the incurable breakdown of your marriage?

A That's correct.

Q You don't believe that any assistance or counseling from this Court or any other waiting period would aid in curing the problems existing in your marriage?

A That's true.

Q In your petition, Mr. Spalding, you state that there is no property subject to division by this Court. Actually what property there is has been divided by other courts; is this correct?

A That is correct.

Q So there is nothing to do today by this Court except to grant a judgment of dissolution of marriage involving your status, there are no property rights, in other words?

A That is true.

MR. CHURTON: Your Honor, I don't have any further questions, unless you do. We would ask that this judgment of dissolution be entered.

THE COURT: Yes, we will enter it. I forget. I believe you asked as to residency?

THE WITNESS: Yes, he did.

THE COURT: Enter the judgment of dissolution, specifically noting we are not making any order regarding any distribution or division or property or support in this particular proceeding.

MR. CHURTON: May I give you the interlocutory judgment at the same time, Your Honor?

THE COURT: All right.

MR. CHURTON: This is the declaration of lost summons. Interlocutory judgment, which incorporates provisions, Your Honor, concerning prior support awards that have been made in this case.

THE COURT: I came across a small award. Are these the ones currently --

MR. CHURTON: No.

THE COURT: In view of the sizeable income --

MR. CHURTON: There have been very large awards.

THE COURT: I notice Mr. Spalding says he has been paying substantial amounts of money, but I thought I came across one that was relatively small.

MR. CHURTON: That's not correct.

THE COURT: All right.

An interlocutory judgment of dissolution will be granted as prayed for and the Court will also order that until further order of the Court, Petitioner continue to make all support payments for the benefit of the Respondent and the children as are currently required by the courts of the State of Connecticut and New York as they may be from time to time modified, and will order the declaration for the lost summons be filed and the declaration of mailing to Mrs. Spalding.

MR. CHURTON: Thank you, Your Honor.

THE COURT: You can take that.

THE WITNESS: Thank you, Your Honor.

---oOo---

81

Name, Address and Telephone Number of Attorney(s)

COOPER, WHITE & COOPER
R. BARRY CHURTON
44 Montgomery Street, Suite 3300
San Francisco, California 94104
Telephone: 433-1900

Attorney(s) for Petitioner

Space Below for Use of Court Clerk Only

FILED

AUG 17 1971

MARVIN CHURCH, County Clerk
By Marilee Peterson
DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

In re the marriage of

Petitioner: CHARLES F. SPALDING

and

Respondent: ELIZABETH C. SPALDING

CASE NUMBER

155 616

REQUEST AND DECLARATIONS FOR FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE

The court acquired jurisdiction of the respondent on 9/23/70 (Date) by:

☒ Service of process on that date, respondent not having appeared within the time permitted by law.

☐ Service of process on that date and respondent having appeared.

☐ Respondent on that date having appeared.

An interlocutory judgment of dissolution of marriage was granted by this court on June 11, 1971 (Date), and entered in Judgment Book No. 387, page 1119, on June 11, 1971 (Date).

Since the granting of the interlocutory judgment, each of the following is true of my own knowledge except as stated below:

(a) The parties have not become reconciled and have not agreed to dismiss this proceeding.

(b) No motion to set aside or annul the interlocutory judgment or suit brought therefor is pending and undetermined, and no appeal has been taken or is pending therefrom, and said judgment has become final.

☒ I request that final judgment be entered.

☐ I request that final judgment be entered nunc pro tunc as of (Date) for the following reason:

* I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____ (Date), at _____ (Place), California.

COOPER, WHITE & COOPER

Attorney(s) for Petitioner (Petitioner/Respondent)

Charles F. Spalding

(Signature of Petitioner/Respondent)

* This declaration under penalty of perjury must be executed within California. If document is executed outside California, attach an affidavit.

Form Adopted by Rule 1288 of Judicial Council of California Effective January 1, 1970

REQUEST AND DECLARATIONS FOR FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE

82

RE D AUG 25 1971

Name, Address and Telephone Number of Attorney(s)

COOPER, WHITE & COOPER
R. BARRY CHURTON
44 Montgomery Street, Suite 3300
San Francisco, California
Telephone: 433-1900

Attorney(s) for Petitioner

Space Below for Use of Court Clerk Only

FILED

AUG 17 1971

MARVIN CHURCH, County Clerk
By Madeline Teixeira
DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

In re the marriage of

Petitioner: CHARLES F. SPALDING

and

Respondent: ELIZABETH C. SPALDING

CASE NUMBER
155 616

FINAL JUDGMENT (MARRIAGE) OF
Dissolution
(LEGAL SEPARATION/NULLITY/DISSOLUTION)

ENT. AUG 17, 1971 DOL. 390 PG. 438 Nunc pro tunc as of 8-10-71 as clarified 9/24/71

This proceeding was heard on June 11, 1971 (Date) before the Honorable Gerald E. Ragan,

Department No. 12.

The court acquired jurisdiction of the respondent on September 23, ~~1970~~ (Date) 1970 by:

☒ Service of process on that date, respondent not having appeared within the time permitted by law.

☐ Service of process on that date and respondent having appeared.

☐ Respondent on that date having appeared.

The court orders that:

☐ Pursuant to ☐ Civil Code Section 4506(1) or ☐ Civil Code Section 4506(2), a Judgment of Legal Separation and such other orders as are set out below be entered.

☐ Pursuant to ☐ Civil Code Section 4400, ☐ Civil Code Section 4401, or ☐ Civil Code Section 4425( ), a Judgment of Nullity and such other orders as are set out below be entered, and that the parties be restored to the status of unmarried persons.

☐ Pursuant to ☒ Civil Code Section 4506(1) or ☐ Civil Code Section 4506(2), a Final Judgment of Dissolution be entered, and that all of the provisions of the interlocutory judgment, which was entered on June 11, 1971, except as otherwise set out below, be made binding the same as if set forth in full, and that the parties be restored to the status of unmarried persons.

The court also orders that, until further order of this Court, petitioner continue to make all support payments for the benefit of respondent and his children, as are currently required of him by the orders of the courts of the States of Connecticut and New York, as the same may from time to time be modified.

Dated Aug. 16, 1971

J. A. Brennan
Judge of the Superior Court

Form Adopted by Rule 1269 of Judicial Council of California Effective January 1, 1970

FINAL JUDGMENT (MARRIAGE)

FILED
SEP 21 1971
MARVIN CHURCH, County Clerk
By Madeline Johansen
DEPUTY CLERK

COOPER, WHITE & COOPER
R. BARRY CHURTON
44 Montgomery Street, Suite 3300
San Francisco, California 94104
Telephone: 433-1900

ENT SEP 24 1971 VOL 391 PAGE 288

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

In re the marriage of

Petitioner: CHARLES F. SPALDING

and

Respondent: ELIZABETH C. SPALDING

NO. 155 616

ORDER

The motion of CHARLES F. SPALDING for the order hereinafter made came on regularly for hearing this day. Cary C. Boyden appeared as attorney for petitioner, and ~~appeared as attorney for respondent.~~

On proof being made to the satisfaction of the Court and good cause appearing therefor:

IT IS HEREBY ORDERED that the Final Judgment of Dissolution in the above-captioned action be ~~signed, dated and filed and~~ entered nunc pro tunc as of August 10, 1971.

DATED: September 20, 1971.

JUDGE OF THE SUPERIOR COURT

COOPER, WHITE & COOPER

REGISTER OF ACTIONS SUPERIOR COURT

Charles F. Spalding, Pet. *Plaintiff*

and *Against*

Elizabeth C. Spalding, Resp. *Defendant*

Attorney for Plaintiff

No. 155616 *Action* Dissolution of marriage

35

Attorney for Defendant

Date Filed 1970	PROCEEDINGS	Receipt No.	Minute Book	Page	PLAINTIFF Dr.	PLAINTIFF Cr.	DEFENDANT Dr.	DEFENDANT Cr.
Sep 15	Petition	80125			3600		3600	
15	Summons Issued							
15	Ret conf'd guest							
Oct 13	Affidavit of Service							
22	Decl in support of order granting extension of time and order - to and incl Nov 6, 1970 to plead	85447					2100	2100
Nov 6	Motion to dismiss or stay action 11/24-70							
23	Stip for continuance (from 11/24/70 to 12/1/70)							
24	Min Ent'y - Motion cont'd to 12/1/70		204	25				
Dec 1	Min Entry - Hearing - Matter submitted on 12/16/70		204	141				
Dec 1	Memo of Points and Auth in Opposition							
11	Resp Closing memo. in support of motion to Dismiss or stay action							
1971								
Jan 7	Decision							
Jan 7	Min entry - decision		204	264				
15	Order dgr NOTICE MAILED TO to stay or dismiss action JAN 18 1971 AND AFFIDAVIT OF MAILING		381	912				
Jun 8	Payment & Dem re Deficit							
Jun 11	Declaration of Alan L Fox regarding Lost Summons							
Jun 11	Request & Dem re Deficit							
Jun 11	Deficit retired							
11	Interlocutory - filed & ent		387	1119				
11	Min. Entry Trial & Decision		20	156				
29	Certified transcript of proceedings							
Aug 17	Req & Dep Fund							
17	Final - Dec'd	filed & ent	393	438				

REGISTER OF ACTIONS SUPERIOR COURT

Chas. F. Spaeding	Plaintiff		Attorney for Plaintiff
Against		No. 155616	Action
Elizabeth C. Spaeding	Defendant		Attorney for Defendant

PRINTED BY CARLISLE CO., S.F. CA22-76

Date 1971	PROCEEDINGS	Receipt No.	Minute Book	Page	PLAINTIFF Dr.	PLAINTIFF Cr.	DEFENDANT Dr.	DEFENDANT Cr.
Sept. 10	Ret. of motion; motion; Declar. of R. Barry Dinerstein; Points & authorities 9-20-71 at 9 a.m.							
	20. Mis. safety. Motion granted - hearing					217.47		
	21. Order filed & ent					391.788		
SEP 22 1971	NOTICE OF ENTRY OF JUDGMENT AND AFFIDAVIT OF MAILING							
Nov 1.	Not. of withdrawal from domestic relations case for respondent.							

STATE OF CALIFORNIA
COUNTY OF SAN MATEO } ss.

I, MARVIN GRUBB, County Clerk of the above entitled County and Court, do hereby certify that the foregoing is a full, true and correct copy of the original thereof now on file in my office.

Witness my hand and seal of said Court this 29th day of Nov 1976.

MARVIN GRUBB
County Clerk and ex-officio Clerk of said Court

By Catherine Blaine

APPENDIX B

SPALDING vs. SPALDING [11]

WITHDRAWAL OF FIRST COUNT

The plaintiff in the above-entitled matter hereby withdraws the First Count of her complaint.

THE PLAINTIFF,

by RICHARD A. SILVER
Her Attorney

Filed June 23, 1972

MEMORANDUM OF DECISION

The controversy between the parties had been running along for about 10 years. Whatever is done now will not bring the parties together. The plaintiff is not seeking a divorce. She is interested only in whatever money she can get. It is her intention to pursue the defendant in the Connecticut or New York courts to insure financial security for herself. Counsel for the defendant has stipulated many times on the record and in his brief that the California divorce will not deprive the states of Connecticut or New York from jurisdiction over financial aspects of the controversy. In fact, the California divorce sets forth that the "petitioner continue to make all support payments for the benefit of the respondent and his children as are currently required him by the orders of the courts of the states of Connecticut and New York as the same may from time to time be modified."

That reservation, plus the many stipulations and statements of defendant's counsel that Connecticut shall continue to have jurisdiction over the financial controversies between the parties will insure any and all financial orders passed by the Connecticut court.

[12] SPALDING vs. SPALDING

The question for determination here is whether the defendant's California divorce is valid. The conduct of the defendant throughout is neither honorable nor praiseworthy. The trouble started when he got a Nevada divorce which was invalidated by the courts of New York. Regardless of the fact that he was not divorced, he married a Mrs. Sullivan. Mrs. Sullivan did not like living in New York and so she and the defendant moved to California. His intentions were to establish a residence in California partly to please Mrs. Sullivan and partly to acquire sufficient residence in that state to [illegible] ce against the plaintiff. It so happened that Mrs. Sullivan became ill and died about two months after he moved to California. Obviously, her illness, her death, the probating of her estate and many personal matters required his presence in California. During that period he came to New York many times to care for his business and other personal matters. He, nevertheless, established a residence in California, became a voter there and regarded himself as a resident of California. He transacted much of his business from his home, made business trips from there and came to New York frequently on business, but always regarded himself as a resident of San Mateo County.

After he had established the requisite residence in California he brought a divorce action against the plaintiff. While she had an attorney to handle the preliminary matters, she did not appear in the divorce action and the defendant obtained a divorce in California. While the divorce was pending, the plaintiff obtained an injunction in Connecticut to restrain the defendant from proceeding with his divorce proceeding. He ignored the injunction and was held in contempt of court in Connecticut, but this did not stop him in his proceeding in California. While this is not to his credit,

it is not involved in this proceeding. In due course, after his divorce in California became final, the defendant married again. To invalidate the divorce would, of course, invalidate his last marriage, and both parties in this case would begin all over again to litigate their differences.

Counsel for both parties have filed excellent briefs containing all the law involved herein and citing innumerable cases to sustain their respective positions. I believe the time has come to terminate this litigation. The defendant has been ordered to pay to the plaintiff the sum of $1,600 a month and this order will survive the defendant's divorce both by his agreement in the record and by reservation in the divorce.

I have read and reread the transcripts of the evidence. I have studied and restudied the applicable law as stated in both briefs, including what is held in cases of divisable divorces.

From all the evidence, I have concluded that the defendant had established the requisite residence in California to qualify him to bring a divorce as a California resident. While the defendant can be charged with improper intention in establishing his residence, the fact that Mrs. Sullivan, whom he regarded as his wife, was ill and asked him to move to California lessens the impropriety of his intentions. And the fact that he remained with her during her serious illness is in his favor as a factor of his intention.

The plaintiff has withdrawn the first count of her complaint claiming a divorce. It is my opinion that the defendant's divorce in California was valid and binding on her. In so finding, it is ordered here that all orders for alimony

[14] SPALDING vs. SPALDING

and support ordered by the New York court, and that all orders for alimony and support ordered by the Connecticut court remain valid and in full force and effect. And that the provision in the California divorce ordering the defendant to continue to make all support payments for the benefit of the plaintiff and her children as are required of him by the orders of the courts of the states of Connecticut and New York shall likewise remain in full force and effect.

One of the plaintiff's claims in her complaint is for counsel fees. I make no order in that regard, nor do I determine plaintiff's right to such fees. If the parties cannot agree on that matter, I will hear the parties at some future time.

Judgment may enter accordingly.

Bordon
State Referee

Filed February 1, 1974

Judgement entered
February 4th 1974

A. Jennings
Asst. Clerk

STATE OF CONNECTICUT

Elizabeth C. Spalding
of Greenwich, Conn.

vs.

Charles F. Spalding of
Hillsborough, California

Superior Court

County of Fairfield

At Stamford

February 4, 1975

SUPREME COURT

March Term, 1976

ELIZABETH C. SPALDING *v.* CHARLES F. SPALDING

Action by the plaintiff for a declaratory judgment determining the validity of a foreign decree of dissolution of a marriage, brought to the Superior Court in Fairfield County where *Hon. Abraham S. Bordon*, state referee, exercising the powers of the Superior Court, rendered judgment upholding the validity of the decree, and appeal by the plaintiff. *No error.*

Louis Parley, for the appellant (plaintiff).

Saul Kwartin, for the appellee (defendant).

LOISELLE, J. The plaintiff, Elizabeth C. Spalding, originally brought this action in two counts, the first claiming a divorce, custody of minor children, child support, alimony and counsel fees from the defendant, Charles F. Spalding, and the second claiming a temporary injunction to restrain the defendant from pursuing in California an action pending there for dissolution of the marriage. The present action was referred to a state referee, but before it was brought to trial the California Superior Court rendered a judgment of dissolution of the marriage. The plaintiff then amended her complaint by adding a third count which sought a declaratory judgment decreeing that the California judgment was null and void. She also withdrew her claim for divorce. The second count was not pursued, and the trial proceeded on the third count. The state referee, exercising the powers of the Superior Court, and hereinafter referred to as the court, adjudged the California divorce to be valid. The plaintiff has appealed from the judgment, including in her claims of error the court's subsequent denial of her request for counsel fees.

The plaintiff contends that the California decree was null and void because the defendant was never domiciled in California. The California suit was begun on September 14, 1970. On November 4, 1970, the present action was filed in Superior Court. On June 11, 1971, the California court granted an interlocutory divorce decree and on August 10, 1971, the decree became final.

The unattacked findings of fact are, in part, as follows: The defendant lived with the plaintiff and their children in Connecticut until 1962, when he moved to New York. In 1964, he obtained an ex parte decree of divorce at Reno, Nevada. That decree was subsequently invalidated by the New York Supreme Court on March 13, 1968, because the defendant was not a bona fide domiciliary of Nevada. On January 1, 1968, the defendant began employment with Lazard Freres whose only office in the United States was in New York City.

On May 11, 1968, the defendant married Amy Sullivan in California. Although they returned to New York to live, Amy maintained ownership of her home in Hillsborough, California, as a residence for her children. In the spring of 1969, the defendant and Amy desired to move permanently to California. During the early summer of 1969, the

defendant wanted to find a permanent job in California. By the end of July, 1969, the defendant and Amy had moved from New York to California with all of their personal belongings. During Labor Day weekend in 1969, Amy first experienced the symptoms of the fatal illness from which she died on December 19, 1969. From September 14, 1969, until Amy's death, the defendant was continually in California carrying on his employment with the exception of possibly one or two days.

After the first indications of Amy's illness, the defendant felt a responsibility for her four children from a previous marriage, and so, immediately after Amy's death, he started caring for them. In 1970, much of his time was spent dealing with them and their problems.

In January, 1970, the defendant and his employer agreed that he could work less than full time and at the end of 1970 there would be a review of his employment situation. During 1970, essentially all of the defendant's work for Lazard Freres involved California business. During that year the defendant had neither an office nor a secretary in New York, and he used his home in California as his business office. All of his work had to be referred to the New York office and new business had to be discussed in conferences held in New York. The directory issued by his employer in 1970 listed the defendant's address as Hillsborough, California.

At the end of 1970, the defendant subleased an apartment in New York for a term of one year beginning January 1, 1971. From July, 1969, to January, 1971, the defendant stayed at the River Club when visiting New York because he had no home in the area. After moving into the New York apartment the defendant returned to California once or twice a month, still helping to run the household and helping his stepchildren.

The defendant met Bernice R. Grant in June, 1970. They were together at various times in California in 1970. They became engaged in November, 1970, and were married on August 10, 1971. Shortly after their marriage the defendant and Bernice decided to move to New York. Their decision was prompted by the nature of the defendant's work, Bernice's preference to live in New York and the effect on all the children involved. The bulk of the defendant's personal belongings was not moved to New York until September, 1971, the same month in which he and Bernice arranged to buy an apartment in New York.

In September, 1969, the defendant registered as a voter in California and obtained a California driver's license. His only checking account in 1970 and 1971 was in a California bank. He filed his federal income tax for 1969 and 1970 as a resident of Hillsborough, California. He filed a California income tax return and a nonresident New York income tax return for 1970. During that year he paid California income tax based on his residence in California. On seventeen occasions during 1970, the plaintiff called the defendant at his California home. It is noteworthy that the summons in this case, filed November 4, 1970, describes the residence of the defendant as Hillsborough, California. Many paragraphs in the finding relate to various dates in 1969, 1970 and 1971, indicating the whereabouts of the defendant. It is evident from the finding, without enumerating the dates, that the defendant traveled extensively, but a majority of his time in 1971 was spent in New York.

The California judgment is entitled to full faith and credit if the California Superior Court had proper jurisdiction to render the judgment. *Williams* v. *North Carolina*, 325 U.S. 226, 229, 65 S. Ct. 1092, 89 L. Ed. 1577, hereinafter referred to as *Williams II*. If the defendant was domiciled in California, the court had jurisdiction to dissolve the marriage.[1] *Williams II*, supra; *Williams* v. *North Carolina*, 317 U.S. 287, 297, 63 S. Ct. 207, 87 L. Ed. 279, hereinafter referred to as *Williams I*; *Taylor* v. *Taylor*, Conn. (36 Conn. L.J., No. 51, pp. 14, 15); *White* v. *White*, 138 Conn. 1, 8, 81 A.2d 450; see annot., 28 A.L.R.2d 1303, 1304–17. And durational domicil or residency requirements of the dissolution statutes of the decree-granting state must be met if the effect of the requirement is to limit the court's jurisdiction to grant a divorce to those cases in which the requirement is met. *White* v. *White*, supra. The court in the present action concluded that at the institution of the California divorce proceedings the defendant had been a California domiciliary for fourteen months and that this was sufficient to satisfy the jurisdictional requirements of federal and California law[2] and to entitle the judgment to full faith and credit. The plaintiff, however, contends that the federal constitution also requires that the defendant must have

[1] Section 46-35 of the General Statutes is not at issue in the present case, and we make no comment upon its jurisdictional requirements.

[2] The applicable statute provides: "A judgment decreeing the dissolution of a marriage may not be entered unless one of the parties to the marriage has been a resident of [California] for six months and of the county in which the proceeding is filed for three months next preceding the filing of the petition." Cal. Civ. Code § 4530 (a) (Deering, 1972). Under this statute, a resident is equivalent to a domiciliary. *Johnson* v. *Johnson*, 245 Cal. App. 2d 40, 44, 53 Cal. Rptr. 567. As the court concluded that the defendant complied with California law, we need not determine the jurisdictional effect of the durational domicil requirement.

been domiciled in California on the day the California judgment was rendered. For this proposition she cites *Williams I* and *Williams II*; *Esenwein* v. *Commonwealth ex rel. Esenwein*, 325 U.S. 279, 65 S. Ct. 1118, 89 L. Ed. 1608;[3] *Litvaitis* v. *Litvaitis*, 162 Conn. 540, 546, 295 A.2d 519; and *Rice* v *Rice*, 134 Conn. 440, 58 A.2d 523, affirmed, 336 U.S. 674, 69 S. Ct. 751, 93 L. Ed. 957.

"In the absence of an express statutory provision to the contrary, it is well settled that if the plaintiff in a suit for a divorce satisfies the residency requirements at the time of commencing proceedings, the court's jurisdiction will survive the plaintiff's change of domicil. 24 Am. Jur. 2d, Divorce and Separation, § 256; note, 7 A.L.R.2d 1414-17; cf. note, 89 A.L.R. 1203." *Baker* v. *Baker*, 166 Conn. 476, 488, 352 A.2d 277. See 27A C.J.S., Divorce, § 74a; see also *Michigan Trust Co.* v. *Ferry*, 228 U.S. 346, 353, 33 S. Ct. 550, 57 L. Ed. 867; *Boardman* v. *Boardman*, 135 Conn. 124, 132, 62 A.2d 521; *Sampsell* v. *Superior Court*, 32 Cal. 2d 763, 781, 197 P.2d 739. There is no California statute contrary to the rule in *Baker*. Given such a rule, jurisdiction may be determined as of the day the action is begun without regard to the defendant's domicil when the decree is entered. The federal constitution does not demand more. *Andrews* v. *Andrews*, 188 U.S. 14, 38, 23 S. Ct. 237, 47 L. Ed. 366; *Bell* v. *Bell*, 181 U.S. 175, 21 S. Ct. 551, 45 L. Ed. 804; *Long* v. *State*, 44 Del. 262, 274, 65 A.2d 489.

Williams I never reached the issue whether one state could refuse full faith and credit to a sister-state divorce decree upon a finding of no bona fide domicil in the sister state.[4] *Williams II* reached that issue but did not change, or add further requirements to, the method of determining jurisdiction that is based on domicil, despite the opinion's suggestive language in its comment on the instructions given the North Carolina jury.[5] *Esenwein* v. *Commonwealth ex rel. Esenwein*, supra, dealt with the same issue and, like *Williams II*, did not change the determination. *See Commonwealth ex rel. Esenwein* v. *Esenwein*, 153 Pa. Super. 69, 71, 33 A.2d 675. Furthermore, in *Williams II* and *Esenwein* the trial courts found the petitioners had never acquired domicil in the other state.

Turning to the Connecticut cases, the court's language in *Rice* v. *Rice*, 134 Conn. 440, 441, 58 A.2d 523, a case involving the recognition of a Nevada divorce decree, supports the plaintiff's position. That language equated domicil on the date of the decree with the proper jurisdiction for recognition under the full faith and credit clause. It must be read, however, in the light of the fact that the state referee in that case found that the complainant in the Nevada action had never acquired domicil in Nevada. Furthermore, in the later case of *White* v. *White*, 138 Conn. 1, 8, 81 A.2d 450, the court looked to domicil at the date the action in the other state began.[6] *Rice* v. *Rice*, supra, is inconsistent with both *Baker* v. *Baker*, supra, and *White* v. *White*, supra, and, to the extent of the inconsistency, it is overruled. The court in the present action properly looked to domicil at the institution of suit.[7]

The plaintiff asserts that the findings do not support the conclusion that the defendant was domiciled in California when the California action began, and the conclusion that the California durational domicil requirement had been met. "To constitute domicil, the residence at the place chosen for the domicil must be actual, and to the fact of residence there must be added the intention of remaining permanently; and that place is the domicil of the person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose,

[3] The *Williams* cases involved the North Carolina prosecution for bigamous cohabitation of two individuals who had obtained Nevada divorces and then had returned to North Carolina. In *Williams I* the court reversed the judgment of conviction because the North Carolina Supreme Court had relied on *Haddock* v. *Haddock*, 201 U.S. 562, 26 S. Ct. 525, 50 L. Ed. 867, a case it overruled. The action was tried again, appealed to the state Supreme Court, and the petitioners, the defendants below, were granted certiorari by the United States Supreme Court. In *Williams II* the court said North Carolina was entitled to find that the petitioners (p. 239) "did not acquire domicils in Nevada and that the Nevada court was therefore without power to liberate the petitioners from amenability to the laws of North Carolina governing domestic relations." *Esenwein* v. *Commonwealth ex rel. Esenwein*, 325 U.S. 279, 65 S. Ct. 1118, 89 L. Ed. 1608, was decided on basically the same grounds.

[4] The opinion of the court said: "[W]e must treat the present case for the purpose of the limited issue before us precisely the same as if petitioners had resided in Nevada for a term of years and had long ago acquired a permanent abode there." *Williams I*, 317 U.S. 287, 292, 63 S. Ct. 207, 87 L. Ed. 279.

[5] The opinion of the court had the following comment on the jury instructions: "The burden, it was charged, then devolved upon petitioners 'to satisfy the trial jury, not beyond a reasonable doubt nor by the greater weight of the evidence, but simply to satisfy' the jury from all the evidence, that petitioners were domiciled in Nevada at the time they obtained their divorces." *Williams II*, 325 U.S. 226, 235, 65 S. Ct. 1092, 89 L. Ed. 1577. The opinion of the North Carolina Supreme Court, however, contained the following: "The court further instructed the jury that since the defendants had set up these foreign judgments as a defense [against charges of bigamous cohabitation] and the prosecution had challenged them, the practice in this jurisdiction was to require the defendants to show to the satisfaction of the jury that they had acquired bona fide domicils in the foreign state at the time of the institution of the divorce proceedings." *State* v. *Williams*, 224 N.C. 183, 184, 29 S.E.2d 744.

[6] Another case relied upon by the plaintiff, *Litvaitis* v. *Litvaitis*, 162 Conn. 540, 295 A.2d 519, was decided, not pursuant to the command of the full faith and credit clause, but under the principle of comity.

[7] That the complaining party in the sister state was not a domiciliary on the date of the decree is a fact that should not be disregarded. It is a fact, among others, tending to show the intention of that party. See *Long* v. *State*, 44 Del. 262, 274, 65 A.2d 489.

but with the present intention of making it his home, unless or until something which is uncertain or unexpected shall happen to induce him to adopt some other permanent home." *Mills* v. *Mills*, 119 Conn. 612, 617, 179 A. 5; *Adams* v. *Adams*, 151 Conn. 389, 391, 225 A.2d 188. Whether the court was warranted in concluding that the defendant had established a bona fide domicil in California depends upon whether that is a reasonable inference from the subordinate facts found. No detailed discussion is required to demonstrate that the facts recited afford a sufficient basis for the conclusions that the defendant was domiciled in California at the institution of the suit, and that the plaintiff did not overcome the presumption that the California court had jurisdiction.

Since this court has reviewed the merits of the case, it is not necessary to explore, in depth, the court's conclusion, and the defendant's argument, that the plaintiff appeared in the California dissolution action and either did or could have contested the jurisdiction of the court in that action, and that she has been barred from litigating the jurisdictional issue in this action. We note from the finding that the plaintiff entered a special appearance in the California action seeking dismissal of the action on the ground of forum non conveniens. Her main argument relied on the order of the Connecticut Superior Court enjoining the defendant from pursuing the California action. The plaintiff did not make a general appearance in the action, did not personally appear in California, and did not litigate the issue of domicil in that action. On those facts, it cannot be held that the doctrine of *Sherrer* v. *Sherrer*, 334 U.S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429, bars a collateral attack on the jurisdiction of the California Superior Court. See cases in annot., 28 A.L.R.2d 1303, 1317-34.

The plaintiff claims error in the court's refusal to grant counsel fees to the plaintiff. The power to make an allowance for counsel fees in litigation pertaining to divorce matters is inherent in the court. *Krasnow* v. *Krasnow*, 140 Conn. 254, 261, 99 A.2d 104. The allowance for counsel fees, and the amount, is a matter which, like the fixing of alimony, calls for the exercise of judicial discretion. Id., 262; *Felton* v. *Felton*, 123 Conn. 564, 567, 196 A. 791. "The basis of the allowance [to a wife for expenses of divorce litigation] is that she should not be deprived of her rights because she lacks funds which may be supplied from property in which as a wife she has a real interest but which is usually within the control of the husband." *Steinmann* v. *Steinmann*, 121 Conn. 498, 505, 186 A. 501; *Stoner* v. *Stoner*, 163 Conn. 345, 356, 307 A.2d 146; *England* v. *England*, 138 Conn. 410, 416, 85 A.2d 483. The plaintiff, at the time of judgment, had assets of $169,980. The record supports the conclusion that the plaintiff had ample funds to litigate the present case. The court did not abuse its discretion in refusing to allow counsel fees. As the court specifically exercised its discretion in this matter, its further conclusion that counsel fees could not be awarded in an action for a declaratory judgment need not be examined.

There is no error.

In this opinion the other judges concurred.

SUPREME COURT

April Term, 1976